Oregon State Bar CLE Seminars

Advanced Estate Planning 2024



Cosponsored by the Estate Planning and Administration Section

Friday, June 14, 2024, 8:25 a.m.–3:45 p.m.

5 General CLE credits and 1 Ethics (Oregon specific) credit

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OREGON STATE BAR
16037 SW Upper Boones Ferry Road
P.O. Box 231935
Tigard, OR 97281-1935

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— Barbara Smith, *Heltzel Williams PC, Salem, Oregon*

NOTES

SCHEDULE

8:25 Welcome

8:30 Oregon Update—What's New, Important, or Just Interesting

- ✦ 2023 Session legislation
- ✦ Cases of note, including a federal probate exception, inherited property and dissolution of a marriage, and parentage, malpractice, guardianship, and undue influence

Susan Gary, *University of Oregon School of Law, Eugene*

9:30 Transition Break

9:35 Charitable Remainder Trusts: Mystery or Mastery?

- ✦ Ways to design a CRT to be flexible and meet clients' needs
- ✦ How to easily draft a CRT using a multifunction template
- ✦ Save time with client intake by using a fill-in CRT questionnaire

Lynda Sands, *Attorney at Law, Redmond*

11:05 Networking Break

11:20 Wills and Won'ts: Navigating the Ethical Tightropes of Estate Planning

- ✦ Having competent clients
- ✦ Confidentiality: how and when to authorize release of the files
- ✦ Conflicts of interest: joint representations
- ✦ Can you represent too many family members?

David Elkanich, *Buchalter, Portland*

12:20 Lunch

1:00 Use It or Lose It—Planning for the 2026 Exemption Sunset

- ✦ Pre- and post-sunset math
- ✦ Clawback potential
- ✦ Gifting strategies
- ✦ SLATs
- ✦ Grantor trusts

John Draneas, *Draneas Huglin Dooley LLC, Lake Oswego*

2:30 Networking Break

2:45 Farms, Forests, and Fish—The Triple F in Estate Planning

- ✦ Make hay while the sun shines: the new natural resources property exemption
- ✦ Fish or cut bait: comparing the natural resource exemption with the natural resource credit
- ✦ The forest has me beleafing in magic: planning for these unique assets to save Oregon estate tax

Heather Gilmore, *Heather O. Gilmore PC, Keizer*
Barbara Smith, *Heltzel Williams PC, Salem*

3:45 Adjourn

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FACULTY

John Draneas, *Draneas Huglin Dooley LLC, Lake Oswego.* Mr. Draneas has been an Oregon attorney since 1977 and a CPA since 1978. His practice focuses on business and tax planning for individuals, many of whom are owners of family and other closely held businesses. He is a member of the American College of Trust & Estate Counsel, the American Bar Association, the Oregon Society of CPAs, and the Estate Planning Council of Oregon.

David Elkanich, *Buchalter, Portland.* Mr. Elkanich is chair of the firm's Professional Responsibility Practice Group. He focuses his practice primarily on legal ethics, risk management, and discipline defense. He advises lawyers, law firms, in-house legal departments, and students and other professionals on a variety of ethics issues, including conflicts of interest, confidentiality, fee disputes, internal investigations, law firm dissolutions and partnership disputes, malpractice and professional liability cases, and litigation issues such as withdrawal and disqualification motions. Mr. Elkanich is admitted to practice in Oregon, Washington, and Idaho.

Susan Gary, *University of Oregon School of Law, Eugene.* Ms. Gary is a Professor Emerita of Law at the University of Oregon School of Law, where she has taught estate planning, trusts and estates, and nonprofit organizations. She is an Academic Fellow and former Regent of the American College of Trust and Estate Counsel. She has served as a Director of the ACTEC Foundation, a Commissioner on the Oregon Law Commission, and a member of the American Bar Association Real Property, Trust and Estate Section Council. She served as Reporter for the Uniform Law Commission's Electronic Wills Act, the Uniform Prudent Management of Institutional Funds Act (UPMIFA), and the Model Protection of Charitable Assets Act. Ms. Gary is a member of the American Law Institute and a former trustee of the University of Oregon.

Heather Gilmore (she/her), *Heather O. Gilmore PC, Keizer.* Ms. Gilmore's practice is dedicated to estate planning, estate administration, probate, and elder law. Her practice emphasizes complex estate and trust administration, estate tax issues and filing estate tax returns, coordinating the interaction of estate and trust tax issues with income tax professionals, difficult protective proceedings only in cases where the court appoints Ms. Gilmore on its own motion, representation of corporate, professional, and individual fiduciaries, and practical problem solving for sophisticated issues that arise in guardianships, conservatorships, estates, and trust administration. Ms. Gilmore is a frequent speaker and author.

Lynda Sands, *Attorney at Law, Redmond,* Ms. Sands serves as a consultant to nonprofit clients, advising on the proper management of endowments funds and donor advised funds. Her clients include high–net worth real estate investors, CEOs and top management of closely held companies, and financially successful families seeking to create new public charities, private foundations, and charitable trusts. She often assists other advisors with philanthropic planning for their clients. Ms. Sands served for a number of years on the faculty of Golden Gate University Business School teaching Masters candidates in tax. She was the first woman president of the San Francisco Estate Planning Council, was the founding president of San Francisco Women Tax Lawyers, and is past chair of the San Francisco Bar Association Probate and Trust Division. Ms. Sands has trained more than 35,000 financial advisors and planned giving officers and has presented over 1,000 times for audiences in every state except Alaska. Ms. Sands is the author of six books on charitable planning, in addition to many training manuals and over 200 professional articles both in her newsletter and other professional journals.

Barbara Smith (she/her), *Heltzel Williams PC, Salem.* Ms. Smith practices in estate planning and administration, including business succession planning and tax issues. She is chair of the Oregon State Bar Estate Planning and Administration Section and has chaired the Willamette Valley Estate Planning Council and the Oregon State Bar Taxation Section as well. Ms. Smith has served as an adjunct professor at Willamette University College of Law teaching the Estate and Gift Tax course.

NOTES

Chapter 1

Oregon Legislation and Cases—2022 Through May 2024

Susan Gary
University of Oregon School of Law
Eugene, Oregon

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Oregon 2023 Legislative Session

Bills are from the 2023 session unless otherwise indicated and are available on the Oregon Legislature's website.

A. SB 309 – Probate Publication Requirements Reduced

SB 309 amends ORS 113.155 to change the number of times notice to interested persons must be published in a newspaper from three consecutive weeks to once. The bill also reduced the number of words required to be included in the publication by three words (to reduce the cost of the publication).

B. SB 308A – Small Estate Affidavit for Transfer to Unfunded Trust

SB 308A renames Oregon's small estate affidavit; the affidavit is now called a simple estate affidavit. The new name reflects an additional use for the affidavit as an alternative to a full probate.

The change addresses the situation in which the decedent had executed a revocable trust document and a pourover will but had not transferred all of decedent's probate assets into the trust before death. The simple estate affidavit may be used if the decedent dies testate and the decedent's will directs that all probate assets be distributed to the decedent's trust. The estate can now use the simple estate affidavit procedure to transfer the assets into the trust, even if the amount exceeds the amount that could be transferred using the small estate procedure to distribute property through a will or by intestacy.

The new standardized form for the simple estate affidavit is available on the OJD website at the following link: https://www.courts.oregon.gov/forms/Pages/simple-estate.aspx.

C. Witness Requirement Change for Declaration for Mental Health Treatment and Appointment of Person to Make Decisions Concerning Disposition of Remains

The witnessing requirement for the Declaration for Mental Health Treatment and Appointment of Person to Make Decisions Concerning Disposition of Remains was changed to permit witnessing by a notary. These documents can now be validated either by the signatures of two competent adult witnesses who either witnessed the principal signing the declaration or witnessed the principal acknowledging the signature or by the notarization of the principal's signature by a notary public. The addition of validation by notarization is new. This change follows a similar change made to the Advance Directive in 2021.

The act incorporated ORS 127.730, the section prohibiting certain persons from serving as a witness, into ORS 127.707 for clarity, so 127.730 was repealed.

D. SB 498 – Estate Tax Exemption of Interest in Farm, Forestry or Fishing Business

This bill creates a new estate tax exemption for an interest in a farm, forestry, or fishing business. The new exemption is an alternative to the natural resources credit allowed under ORS 118.140; an estate may claim either the exemption or the credit but not both.

To qualify for the exemption the decedent must have held the property for at least five years before death and either the decedent or a family member must have "materially participated" in the farm, forestry, or fishing business for at least 75 percent of the days of each of the five years prior to the decedent's death. The property must be transferred to a family member or members, and family members must materially participate in the business for five years after the decedent's death. A penalty will be assessed if the family does not continue to own and operate the business for five years. The exemption allowed cannot exceed $15 million for the estate.

An emergency clause made it effective for decedents dying on or after July 1, 2023.

E. SB 1502 (2022) – Forestland Tax Credit

This bill created an income or corporate excise tax credit, or alternatively a credit against the estate tax, for a small forestland owner that elects to observe the riparian timber harvest restriction that applies to large forestland owners. The election, if made, is, in lieu of using other harvest options available to a small forestland owner. The new section prohibits the transfer of the credit to a successor forestland owner. The section provides for the allowance of the credit and retention of harvest restrictions for 50 years.

SB 1502 applies to all tax years beginning on or after January 1, 2023, and to estates of decedents dying on or after January 1, 2023.

F. SB 909 – LLC Revisions Not Passed – But Stay Tuned

The Oregon Law Commission has worked on a major overhaul of the LLC statute based on the Uniform LLC Act. The revision was introduced as SB 909, but the bill died in committee. The Work Group will continue work on the bill and plans to reintroduce it in 2025.

Oregon 2022-2023 Cases

A. Federal Court

1. Probate Exception Applies to *Inter Vivos* Trust Used as Will Substitute

***Wisnovsky v. Courvrette*, 2023 WL 7404860 (slip copy), Case No. 1:23-cv-00414-CL (Nov. 9, 2023)**

Ann Wisnovsky created a revocable trust in 2012. Her children are all qualified beneficiaries of the trust, and one child, Joanne Couvrette, was acting as trustee before Ann's death. In 2021 Couvrette (Respondent) filed a complaint against the other children (Petitioners) seeking damages based on Petitioners' interactions with their mother and on the use and management of their mother's property. In 2022 Petitioners counterclaimed based on Respondent's interactions with their mother and on the use and management of the property. On February 2, 2023, Petitioners filed a Petition to Remove Trustee in the Circuit Court of the State of Oregon for the County of Jackson Probate Department. On March 16, 2023, Ann Wisnovsky died. On March 21, 2023, Respondent filed Notice of Removal to Federal Court asserting diversity jurisdiction. On April 4, 2023, Petitioners filed a Motion to Remand to the Circuit Court. The Federal District Court granted the Motion to Remand.

Petitioners argued that removal was improper because the probate exception applied. Respondent countered:

> (1) the probate exception does not apply to *inter vivos* trusts; (2) Oregon probate courts do not have jurisdiction over *inter vivos* trusts; (3) Ann Wisnovsky was still alive when the action was initially filed in probate court; (4) removal and replacement of Trustee do not involve the administration of the decedent's estate; and (5) diversity jurisdiction is proper because the amount in controversy exceeds $75,000.

The Federal District Court found that the probate exception applies to *inter vivos* trusts used as will substitutes, basing its holding on the Supreme Court's implicit holding in *Marshall v. Marshall*, 547 U.S. 293 (2006) (the case involved a revocable trust, but the fact that it was an *inter vivos* trust was not discussed directly) and on "the weight of persuasive authority within the Ninth Circuit…."

The court next noted that "Oregon probate courts may resolve *inter vivos* trust administration disputes after the settlor dies, including removing a trustee." The court cited *Holst v. Purdy*, 117 Or. App. 307 (1992), as well as *Administering Trusts in Oregon* (OSB Legal Pubs 2018 § 1.9-2.

An interesting twist is that Respondent argued that the probate exception did not apply because the Petition to Remove Trustee was filed while Ann Wisnovksy was alive. True, but Respondent's Notice of Removal (from the Circuit Court) was filed after Ann's death. The court points out that "the probate exception is not precluded because the requisite jurisdiction [in

federal court] must exist at the time of removal to federal court rather than when the Petition to Remove Trustee is filed."

2. Probate Exception Applies to Revocable Trust, Not to Intentional Interference

***Cagle v. Sattler, as trustee of the Toni Jean Reitman Revocable Living Trust, and individually, and Does 1-5,* 2024 WL 2834063 (United States District Court, D. Oregon), June 3, 2024**

Toni Jean Reitman ("decedent") established the Toni Jean Reitman Revocable Living Trust on May 26, 2021. Then on June 16, 2021, she executed a second trust agreement establishing a trust with the same name because the original trust document was missing. The first trust agreement gave all trust property to the decedent's brother, Richard Reitman ("Reitman"), while the second trust agreement left $100,000 to Reitman and the rest of the trust property to Andrew Sattler ("defendant"), who was also named trustee of the trust. Decedent also executed a pour over will.

Decedent's only child, Elizabeth Heather Cagle ("plaintiff") filed an action in federal court alleging lack of capacity to enter into the second trust agreement and undue influence by Sattler in connection with the second trust agreement. Plaintiff later filed a will contest in the probate case that had been opened by Sattler for the decedent's estate, also alleging lack of capacity and undue influence.

The court cited *Wisnovsky* (among other cases) for the position that "the fact that plaintiff's claims in this action involve the validity of a trust, rather than a will, does not preclude the application of the probate exception." The court noted that the plaintiff was seeking a finding that decedent lacked the capacity to execute the trust agreement in federal court and the will in probate court, and the two documents were executed the same day. A finding that the decedent lacked capacity with respect to the trust would be a finding that the decedent lacked capacity with respect to the will, and that issue—capacity to execute the will—was before the probate court. The court applied the probate exception and held that the court lacked subject matter jurisdiction over the claims involving the trust.

The plaintiff's claim for intentional interference with economic relations fell outside the probate exception, and the court did not dismiss that claim under that exception. The defendant argued lack of subject matter jurisdiction based on diversity of the parties, but the court concluded that it retained subject matter jurisdiction over the intentional interference claim.

3. Joining a Revocable Trust as a Defendant When a Creditor Seeks to Apply the UFTA to an Individual Debtor Who Transferred Property from her Revocable Trust

***Hendricks Law Firm, P.C., and Heather A. Brann, PC v. Peggy S. Foraker, as an individual, and as a trustee of the Foraker Family Trust, and McKenzie Leigh Foraker, as trustee of the Gren Trust*, 2024 WL 1052616 (U. S. District Ct., D. Oregon) (Mar. 11, 2024)**

Plaintiffs in this case are lawyers who represented Peggy Foraker and were awarded attorney fees. As creditors, they are alleging that Foraker fraudulently transferred property into her revocable trust and from that trust to a trust for her daughter. The issues include whether the Uniform Fraudulent Transfers Act (UFTA) applies to a transfer from a revocable trust when the settlor/trustee was the debtor in the person's individual capacity and whether the trustee must be joined as a defendant in the trustee's fiduciary capacity (in addition to being a defendant in an individual capacity).

Under the Oregon Uniform Trust Code, property in a revocable trust is subject to the claims of the settlor's creditors. The defendants argued that although creditors may have an interest in property in a trust, that interest does not make the trust itself a debtor for purposes of the UFTA. The trust transferred the property, so the question is whether that transfer comes within the UFTA.

The court found no authority addressing the question of whether the trust of an individual debtor, who is both the settlor and trustee of the trust, is also a debtor under the UFTA. But the court noted "that creditors attempting to recover on judgments and alleging fraudulent transfer to or from a trust generally name both the individual debtor and the individual debtor in his or her capacity as the trustee of the trust." The court continued:

> Considering the statements by Oregon courts, including the Oregon Supreme Court, that trusts are distinct legal entities to be treated separately from the settlors, trustees, and beneficiaries, and that a settlor's legal interest in real property divests upon being transferred into a trust, the Court concludes that the Foraker Family Trust and Foraker as an individual are not the same person. Further, Plaintiffs' act of simply naming Foraker as a defendant does not suffice to name the Foraker Family Trust nor does Foraker's status as the debtor automatically make the Foraker Family Trust the debtor under the UFTA without including the trust in this lawsuit.
>
> But the Court also must give meaning to the purpose of the UFTA to stop debtors from transferring assets to avoid making them reachable by creditors and to Oregon's law allowing creditors to reach assets of a revocable trust. Therefore, the Court concludes that a creditor may name both an individual debtor and the debtor-as-trustee to assert a UFTA claim under the current circumstances. Thus, Foraker as the trustee of the Foraker Family Trust could have been named as an additional defendant, but Plaintiffs have not yet done so.

Although, courts generally do not permit a party to amend a complaint at summary judgment, the court decided that in this unusual case the court would allow the Plaintiffs to amend the complaint. The court denied Plaintiffs' motion for summary judgment but granted leave to amend the complaint to add Foraker as trustee of the Foraker Family Trust as a defendant.

B. Federal Bankruptcy Court

A Personal Representative is a Victim of a Crime When a Crime was Committed Against the Decedent

***In re Tracy Lampron Cloud, Debtor*, 2024 WL 1348814 (U. S. Bankruptcy Ct., D. Oregon) (Mar. 29, 2024)**

Tracy Lampron Cloud (Tracy) was convicted of Murder in the Second Degree with a Firearm for killing her spouse, Philip Cloud (Philip). She had argued at trial that she acted in self-defense, but the jury found her guilty. She has appealed both the conviction and restitution awarded to the probate estate of Philip. Ruth Ann Munger, the personal representative of Philip's estate, prevailed in cases referred to in the opinion as the Slayer Cases. These cases prevented Tracy from receiving any of Philip's assets by intestate succession or from nonprobate, ERISA-governed transfers. Tracy's appeal was dismissed, and the Oregon Supreme Court denied review.

Munger was awarded a wrongful death judgment against Tracy. Tracy then filed a chapter 7 bankruptcy petition, and Munger moved to dismiss. The statute "allows the court to dismiss a chapter 7 case when the debtor has been convicted of a crime of violence and dismissal is in the best interest of the victim of that crime." The court decided that Munger had met the two statutory requirements. In addition, the court found that Munger was the only unsecured creditor and that continuation of the bankruptcy case would increase expenses with no corresponding benefit. The court granted the motion to dismiss.

C. Oregon Supreme Court

1. Determination of Parentage When ART Used to Create Child

***In the Matter of the Parentage of S.D.S, a Minor Child, (Sause and Schnitzer)*, 371 Or. 573 (Nov. 28, 2023)**
Review Allowed, 368 Or. 787, 498 P.3d 807 (Nov. 21, 2021)
***Matter of Schnitzer*, 312 Or. App. 71 (2021)**

- Genetic relationship alone does not make an egg donor a mother.

- A contract can affect parental rights of parties involved in Assisted Reproductive Technology (ART) and can create non-parental rights with respect to the child.

Jordan Director Schnitzer was divorced and had two daughters from that marriage. He decided he wanted to have a baby boy and attempted to father a child with an anonymous ovum

donor in 2013 and 2014. Those attempts were unsuccessful. In 2014 Schnitzer became involved romantically with Cory Noel Sause. Sause decided to have her ova retrieved for her own reasons, and then later offered them to Schnitzer. Schnitzer and Sause entered into an agreement, allowing Schnitzer to use the ova. The agreement stated that Schnitzer "relinquishes any claim to or jurisdiction over any female embryos from Sause and any resulting female offspring….." and that "Sause confirms and acknowledges that Schnitzer has full jurisdiction custodial rights over the future disposition of male embryos created from her eggs and she renounces any rights and responsibilities of custody of any male embryo." (at 579) Schnitzer entered into a contract with a gestational surrogate, and a male embryo was transferred to the surrogate. A baby was born in December 2015.

Before the baby's birth, the relationship between Schnitzer and Sause had cooled, but they continued to communicate about the pregnancy. Sause set up a nursery in her house, Schnitzer sent her a photo of an ultrasound of the baby, and Sause and her parents were admitted to the birthing room when the child was born. Soon after the birth, Sause and Schnitzer had a falling out over a decision Schnitzer made with respect to the child's care, and Schnitzer decided to cut Sause and her family out of the baby's life.

Shortly after the baby's birth, Schnitzer requested, and obtained, a declaration that he was "the sole and exclusive legal parent of this child." The gestational carrier and her husband were named as parties, but Sause was not.

Some months later, Sause filed an action seeking a declaratory judgment declaring that she is the legal mother of the child as the child's biological mother. The trial court held that Sause was the legal mother of the child. The Court of Appeals reversed, holding that a mere genetic connection does not confer parental status and that Sause, as a genetic mother, did not have a constitutionally-protected parental right. Sause appealed, and the Supreme Court held that Sause was not a parent but that the contract with Schnitzer might have given Sause non-parental rights with respect to contact with the child. The Court remanded to the trial court for a determination of Sause's rights under the contract.

The decision was a four-to-three decision, with two dissenting opinions filed. Both the majority opinion and Justice Bushong's dissent describe the history of parentage under Oregon law at some length.

2. Statute of Ultimate Repose Does Not Apply to Accounting and Legal Malpractice

***Marshall v. Schwabe, Williamson & Wyatt,* 371 Or. 536 (Nov. 28, 2023)**
***Marshall v. PWC and Schwabe*, 316 Or. App. 416 (Dec. 15, 2021)**

The plaintiffs used the services of Schwabe Williamson and Wyatt, P.C. and PriceWaterhouseCoopers, LLP in connection with an audit and tax court litigation. After the litigation ended, the plaintiffs sued the two firms for malpractice. The trial court granted the defendants' motion to dismiss the plaintiff's negligence claim because it was barred by the

statute of repose in ORS 12.115(1). The trial court denied Schwabe's motion to dismiss based on issue preclusion grounds.

On appeal the court found that the trial court had erred in granting the motion to dismiss based on the statute of repose. The Court of Appeals agreed with the denial of the motion to dismiss based on issue preclusion. The court explained that the statute of repose applies to personal injury and property damage cases but does not apply to cases seeking only economic damages unrelated to either a personal injury or damage to tangible property. Thus, the statute does not apply to malpractice claims related to tax and accounting or estate planning.

The Supreme Court reversed the Court of Appeals decision, holding that ORS 12.115(1) applies to "actions in which the plaintiffs allege that their attorney negligently caused injury consisting solely of financial loss—here, the cost to plaintiffs of attempting to defend themselves against a claim for unpaid federal taxes and the anticipated cost of paying that tax liability."

ORS 12.115(1) provides: "[i]n no event shall any action for negligent injury to person or property of another be commenced more than 10 years from the date of the act or omission complained of." The issue was whether "negligent injury to person or property" was intended to include purely financial injury. The plaintiffs argued that "injury to property" referred to physical property and not to other types of property. The opinion provides an extensive review of the legislative history and concludes that "property" includes financial injury to economic interests.

Two dissenting opinions were filed. Justice James' dissent argues that the "court has never clearly articulated a methodology for *how* it determines, in the first instance, whether a term is one of 'common usage' or a 'term of art.'" James' dissent considers the term used by the legislature with its common meaning (tangible property) rather than with its legal meaning which would include intangible property. James' dissent raises the problem that "The lack of a defined methodology has resulted in our classification of terms in ways that, when viewed together, struggle to paint a coherent methodological picture."

The second dissent, by Justice Masih, states, "I agree with the Court of Appeals that we cannot ignore the legislature's choice to forgo the broader wording of 'injury to person or rights of another' from ORS 12.110(1) when it enacted ORS 12.115.1)." This use of more limited wording "left open the possibility that it [the legislature] may have to revisit professional malpractice claims, and it did so after 1967." Masih would leave it to the legislature to clarify and make changes as needed.

3. Is Failure to Honor Contract Elder Abuse?

***Adelsperger v. Elkside Development LLC,* 322 Or. App. 809 (Nov. 30, 2022); review allowed, 371 Or. 476 (Oct. 5, 2023)**

Member-Managers Can Be Liable for Elder Abuse Perpetrated by LLC

***Adelsperger v. Elkside Development LLC,* 317 Or. App. 666 (Feb. 9, 2022); 371 Or. 61, 529 P.3d 230 (May 18, 2023)**

- Elder abuse requires either the taking of property with an improper motive or the refusal to return property when requested to do so by an elder person.

- The statute creates liability for those who perpetrate elder abuse and also those who permit others to perpetrate it, so member-managers of an LLC may be liable for elder abuse perpetrated by the LLC.

Members of an RV camping resort brought an action against Barnett Resorts, LLC, and the two member-managers individually, after the LLC purchased a resort that had been operated by Elkside Development LLC. Elkside members had paid initial fees and annual fees that entitled them to free use of the resort for many days during the year. Barnett Resorts did not honor the memberships. Elkside members sued Barnett Resorts, LLC, and the LLC's two member-managers alleging breach of contract, intentional interference with contract, and elder abuse arising from the LLC's refusal to honor the members' contracts with Elkside.

With respect to Barnett Resorts LLC:

The trial court found that Barnett Resorts LLC committed breach of contract when it failed to honor the membership contracts. The trial court also found the LLC liable for elder financial abuse under ORS 124.100, with treble damages ($900,000 trebled to $2.7 million).

The Court of Appeals upheld the finding of a breach of contract but reversed on the elder financial abuse claim.

The elder financial abuse claim was asserted by 56 of the plaintiffs who were 65 years or older. ORS 124.110(1) provides that an action for elder financial abuse may be brought under two circumstances: "(a) [w]hen a person wrongfully takes or appropriates money or property of a vulnerable person . . ." or (b) when a vulnerable person requests that another person return property that belongs to the vulnerable person and the other person acts in bad faith in not returning the money or property. The Court of Appeals held that the decision not to honor the memberships was not elder financial abuse for two reasons. First, the plaintiffs had not shown an improper motive for the taking of property (assuming, which the court did not decide, that resort memberships were "money or property" within the meaning of ORS 124.110(1)(a)). Second, the plaintiffs had not requested return of property under ORS 124.110(1)(b). Instead, they wanted the benefit of the contract, and a request that a contract be honored does not fall within the elder financial abuse provisions.

With respect to the individual defendants:

The trial court granted summary judgment in favor of the two individual defendants, and the Court of Appeals affirmed. The Oregon Supreme Court reviewed the grant of summary judgment in favor of the individual defendants and held that the LLC member-managers did not have statutory protection from the claim of elder abuse. The Court also held that lack of privity precluded LLC member-managers from being held personally liable for breach of contract.

With respect to the elder abuse issue, the Supreme Court said:

> ORS 124.100(2) creates liability for those that perpetrate elder abuse, as well as those who permit others to perpetrate elder abuse.3 That liability is not vicarious; it is direct. In such an instance, ORS 63.165(1) is not a bar to asserting a claim for a statutory violation of ORS 124.100(2) against a member-manager of an LLC, when the LLC is alleged to be the entity that directly perpetrated the elder abuse. The trial court erred in granting summary judgment as to this claim.

D. Oregon Court of Appeals

1. Potential Malpractice Suit Against Lawyer Who Drafted Will and Served as PR Created Conflict of Interest and Led to Removal for Good Cause Shown

***In the Matter of Estate of Robert Lee Eberhard; Maloney v. Bryant*, 332 Or. App. 745 (May 30, 2024)**

Ronald Bryant (Bryant) and decedent, Robert Eberhard, were friends, and Bryant was decedent's lawyer and business partner. Bryant drafted wills over the years for decedent and his wife. Decedent and his wife had one surviving child, Holly Maloney (Maloney), and one grandchild, J.D. (Maloney's son). The wills for both decedent and his wife nominated Bryant to act as the personal representative of their estates and trustee of the trusts created by their wills.

Each will (of decedent and his wife) distributed $100,000 to a trust for J.D. and the remainder of the estate to a trust for Maloney. After his wife's death, decedent asked Bryant to draft a new will, which he did. The will left out the bequest to J.D.'s trust, and there is conflicting testimony about whether the decedent intended that omission. In the administration of decedent's estate, Bryant distributed $100,000 to J.D.'s trust, even though the will did not authorize that distribution. Bryant also distributed the credit shelter trust created on decedent's wife's death incorrectly.

Maloney sought to remove Bryant as personal representative, and the court removed Bryant "for good cause." Bryant challenged the removal and lost. He raised three errors, which the court addressed. One issue was that he was prevented from presenting testimony that could have established a defense against a claim of malpractice for making a mistake in drafting decedent's will (leaving out the bequest to J.D.'s trust). The trial court had removed Bryant under ORS 113.195(4) (for other good cause shown), and the court on appeal pointed out that the phrase has been construed to permit removal "to prevent problems from arising in the probate,

including discord between the personal representative and the beneficiaries of the estate." (citing Warkentin v. Shirey, 308 Or App 1, 8, 480 P.3d 289 (2020)). The court explained:

> There is sufficient evidence under our standard of review to sustain the trial court's finding of a conflict of interest because there was some evidence in the record that Bryant had made a mistake drafting decedent's will. As a result, Bryant was not in a position to objectively assess the strength of the estate's potential malpractice claim against him. Regardless of the relative merits of such a claim, a conflict of interest arose from the mere fact that Bryant could not be disinterested in evaluating the strength of the claim. Therefore, we conclude that the trial court did not abuse its discretion in removing Bryant as personal representative for "good cause shown."

2. Rule Against Perpetuities

Trustee of the Lois J. Callaway Trust v. Trustee of the Harold G. Olson Revocable Trust and the Wynetta R. Olson Revocable Trust, 330 Or. App. 748 (Feb. 14, 2024)

Unpublished Opinion. This is a nonprecedential memorandum opinion pursuant to ORAP 10.30 and may not be cited except as provided in ORAP 10.30(1).

Two married couples purchased land in 1966, and the four people signed an agreement that included a right of first refusal (ROFR) "in the event that either Party (Callaway or Olson) decided to sell their property…." Eventually both couples put the land into trusts, and those trusts are the parties in the case. In 2020, when Wynetta Olson was the sole surviving signatory to the agreement, the trustee of the Olson Trusts decided to sell a lot. The trustee of the Callaway trust sought to exercise the ROFR, but the trustee of the Olson trusts refused. The trial court granted summary judgment for the defendant (trustee of the Olson trusts) because the court concluded (1) that the ROFR agreement violated the Rule against Perpetuities (the Rule) and (2) that the agreement was personal in nature (personal to the four signatories) and not assignable. The Court of Appeals reversed and remanded.

The trial court found that the agreement violated the Rule because it was not certain to vest within the period of the Rule. The Court of Appeals said that the language in the agreement created a condition precedent for exercise of the ROFR that could be met only within the period of the Rule. That condition precedent was "that either Party (Callaway or Olson) decide to sell their property." The court stated that the "condition is unambiguously limited to the original signatories deciding to sell." Thus, the last time the decision could be made would be immediately before the death of the last signatory. All four signatories were lives in being within the meaning of the Rule, and the period for the condition would end on the death of the last of the four of them to die.

The Court of Appeals also concluded that the ROFR was not personal in nature. The agreement provided that if the condition precedent is met, "the reciprocal party (or any surviving family member)" has a ROFR. The defendant had argued that "surviving family member" meant only the surviving spouse, but the court concluded that the language meant any family member

and not just the spouses, and therefore that the ROFR was not limited to the four contracting people. The right did not depend on assignment, because the agreement provided that a surviving family member could exercise the right. The Court of Appeals also found that the trial court erred in stating that the ROFR was not assignable to the trusts because the defendant had not moved for summary judgment on the basis that the right had been exercised on behalf of a trust. A decision on summary judgment is limited to the issues raised by the moving party.

3. Posthumous Adoption – Matter of First Impression

***In the Matter of the Adoption of J. M. S., a Child*, 327 Or. App. 275, 534 P.3d 283 (July 26, 2023)**

- When a person files an adoption petition and then dies before the adoption is granted, the representative of the decedent/petitioner can pursue the adoption.

Mother and stepfather filed an unopposed petition for stepfather to adopt J., mother's birth daughter. Days after the petition was filed, and before the court acted on the adoption petition, stepfather died suddenly of colon cancer. The trial court dismissed the petition based on the fact that stepfather had died.

In a case of first impression in Oregon, the Court of Appeals concluded that an adoption petition "survives or continues" under ORCP 34. That conclusion permits the personal representative of the deceased adoptive parent to pursue the adoption.

The opinion reviews case law from other states. The court concluded that permitting a posthumous adoption would be in keeping with the legislature's emphasis on the best interest of the child. The court reversed and remanded to allow J's mother the opportunity to move for substitution as allowed by ORCP 34. In the court's words, the conclusion:

> effectuates what we have recognized as the "primary purpose" of an adoption proceeding: "the protection and promotion of a child's best interest."… That is, an adoption proceeding that continues despite the petitioner's death allows for another party to move for substitution as a personal representative and continue the petition in that capacity, ultimately allowing the court the opportunity to determine if adoption is in the child's best interest.

4. Malpractice

Cockey v. Mead, 324 Or. App. 526, 526 P. 3d 1201 (Mar. 8, 2023)

- Statute of limitations begins to run when plaintiff knew or should have known of the harm caused by the lawyer's negligence and not at the conclusion of litigation determining the extent of the harm (the financial cost to the plaintiff of the negligence).

In a legal malpractice case, the statute of limitations begins only when "the client knows or, in the exercise of reasonable care, should know every fact which it would be necessary for the

client to prove *** in order to support his right to judgment." (citing *Kaseberg v. Davis Wright Tremaine, LLP*, 351 Or. 270, 277, 265 P.3d 777 (2011)). In *Cockey v. Mead*, the issue was when the plaintiff knew or should have known that he had incurred the harm.

The legal malpractice action alleged that in a guardianship settlement the attorney committed malpractice by failing to ensure that the independent guardianship of client's adult daughter was temporary and by binding client to fund a special needs trust. The plaintiff admitted that he knew that the negligence had caused harm in October 2016, when he decided to hire a new attorney to file a petition to remove the independent guardian, but he argued that the claim did not accrue until March 2018 when the circuit court construed the trust to require the plaintiff to cover the independent guardian's legal fees and compensation. Plaintiff argued that had he prevailed in that case he would not have been required to fund the special needs trust or pay the guardian's attorney fees. Thus, he would not have suffered legally cognizable harm until the court required him to pay the fees.

The court explained:

> Where the outcome in litigation subsequent to the negligent act could establish that the defendant was not negligent in the first instance, the statute of limitations does not begin to run until the conclusion of that litigation. But where the plaintiff knows or should know that the defendant was negligent, and the litigation subsequent to the negligent act serves only to determine to what extent the plaintiff has been harmed, the statute of limitations begins to run from the time that the plaintiff learns or should have learned that the defendant's act was negligent and that it caused some harm.

The court held that in this case the litigation did not determine whether the defendant was negligent, so the statute of limitations began to run when the plaintiff knew or should have known of the harm. That was in October 2016, so the trial court entered judgment granting attorney and employer's motion for summary judgment because the statute of limitations had run. The Court of Appeals affirmed.

5. Guardianship – Can Attorney's Fees to Terminate Guardianship Be Paid from Spouse's Property?

***Matter of Guardianship of Louie,* 317 Or. App. 378, 506 P.3d 1187 (2022)**

- Property acquired by one spouse during marriage does not belong to the other spouse during the marriage, although the other spouse may have rights to the property on dissolution of the marriage.

- A spouse with earned income is not required to pay fees owed to a court-appointed lawyer who represented the other spouse, unless the fees come within a statutory exception (which the court suggested was unlikely).

In 2016 Andrew Louie was appointed as the court-appointed guardian for his spouse, Jasmine Louie, who suffered from "debilitating mental health issues." In 2019, Jasmine emailed

the court and requested termination of the guardianship. The court appointed counsel for Jasmine, held a hearing, and denied her request, but made changes to the guardianship to make it less restrictive. Jasmine's counsel filed a motion for award of fees and asked the court to direct Jasmine's guardian to pay the fees and costs. Andrew objected, because Jasmine did not work outside the home and the only money available to pay the fees would come from his wages. The trial court granted the fee request, saying that the funds held by the couple were marital property, and Jasmine's share of the marital estate could be properly allocated to payment of her attorney fees.

On appeal, the court analyzed Oregon's treatment of property earned during a marriage. Citing ORS 108.020-050, the court found that Oregon law does not make the property of one spouse the property of the other spouse simply because of the marriage. ORS 108.040 creates a limited exception for "expenses of the family," but the probate court did not rely on that section, and it was not apparent to the Court of Appeals that court-appointed counsel for one spouse could be considered a family expense.

The trial court had relied on a definition of "marital estate" used in connection with "marital annulment, dissolution, or separation." ORS 107.105(1). The Court of Appeals rejected this support for the trial court's decision and remanded the case. The Court of Appeals noted that an alternative basis for affirming the award of fees might be the treatment of the expense as an expense of the family. The Court of Appeals did not decide whether that basis for the grant of fees would work and appears to suggest that it would not. The court said that "it is not clear that the cost of court-appoint counsel in this case is properly viewed as an expense of the family where, in our review of the record, there does not appear to be any agreement that would make the protected person liable for the cost of her court-appointed counsel in the absence of her own funds…." The court suggested that the appointed counsel could develop the argument on remand.

The court added, in a footnote:

> The reach of this opinion will be limited by amendments to ORS 125.080 which currently apply in Multnomah and Lane counties and will gradually roll out across the state. Or. Laws 2021, ch. 400, § 4(1)-(3). Those amendments provide a court the authority to appoint state-funded counsel when it "determine[s] that a respondent or protected person is financially eligible[.]" Or. Laws 2021, ch. 400, § 1(5)-(6).

6. Claim for Medicaid Recovery Against Spouse's Testamentary Trust

DHS v. Hobart, 318 Or. App. 52, 507 P.3d 299 (Mar. 2, 2022)

- For Medicaid reimbursement purposes, the state can set aside a person's transfer if it was made without consideration or with the intent to hinder or avoid estate recovery. The court distinguishes *Nay v. DHS*.

Decedent and her husband lived in a house purchased in 1994 and owned jointly. In early 2012 decedent moved into a nursing facility, and in November 2013 she began receiving

Medicaid. In April 2016, the decedent transferred her interest in the house to her husband, who had advanced cancer. The transfer was without consideration, and they did not disclose the transfer to DHS. On August 23, 2016, decedent died, having received $326,403.82 in Medicaid benefits.

In September 2016, the decedent's husband created a testamentary trust and conveyed the house to the trust. [This is what the opinion says, but decedent was still alive at this time. It seems likely that it was a revocable trust, taking effect at death.] In December 2016, decedent's husband died, and in February 2017 the defendants, acting as successor trustees, conveyed the house from the trust to themselves.

DHS sought to recover Medicaid benefits paid on behalf of the decedent. Transfers made without adequate consideration are voidable under ORS 416.350 and transfers made with intent to hinder or prevent estate recovery are voidable under ORS 411.630. The trial court set aside the April 2016 transfer by the decedent and entered a judgment for the decedent's half of the value of the property at that time. The Court of Appeals affirmed the decision.

Defendants argued that because the decedent did not own the property when she died, there is no property in the decedent's "estate" for DHS to claim. The appellate court explained:

> When a person transfers real property with the specific intent to "hinder or prevent" estate recovery in violation of ORS 411.630(2), or when a Medicaid recipient transfers real property "without adequate consideration" under ORS 416.350(2), ORS 411.620(2) expressly provides for the setting aside of the transfer. We agree with DHS that, when voidable at the time it occurred, the decedent retained an interest in the home at the time of her death. Although it may not be possible to turn back time in fact, one can turn back time in a legal sense. Once set aside, it was as if the transfer had never occurred.

The court distinguished *Nay v. Dept. of Human Services*, 267 Or. App. 240 (2014) (Nay I), aff'd in part, vac'd in part, 360 Or. 668 (2016) (Nay II). The court in *Nay II* agreed that assets available for Medicaid estate recovery are limited to interests the recipient had at the time of death. *Nay II* held that DHS had exceeded its authority in attempting to amend administrative rules to allow estate recovery following certain transfers to a spouse. The court in *Nay II* found "broad differences" between the legal standard in the administrative rules DHS wanted to apply and the legal standard in the statute. In *DHS v. Hobart,* the legal standard itself was at issue. The statutes applied because the decedent transferred her half of the house without adequate consideration and with intent to hinder or prevent estate recovery.

The defendants also argued that federal law preempted the application of the Oregon statutes, and "that the Oregon statutes stand as an obstacle to the accomplishment and execution of Congress's full purposes and objectives." The court was unpersuaded: "The additional framing of defendants' arguments as preemption arguments does not make them more persuasive. That is particularly so because the state and federal definitions of 'estate' are 'parallel.'"

The court summarized its conclusion:

> In the end, we are simply unpersuaded that, when a Medicaid recipient dies, federal Medicaid law requires any and all pre-death transfers to be treated as valid, even if a transfer lacked consideration or was specifically intended to hinder or prevent estate recovery. Defendants argue that, if the trial court's judgment is upheld, it will "allow voiding and setting aside of *any* predeath asset transfers, *not just a home*, between Oregon spouses, made for any reason, *at any time* during a marriage, *not just five years before* a Medicaid application." (Emphases in original.) That is not so, because, for purposes of recovering properly paid Medicaid benefits, the statutes allow a court to set aside a transfer only in two narrowly prescribed circumstances.

7. Undue Influence

Matter of Estate of Schoolcraft, 326 Or. App. 648, 532 P.3d 1257 (June 28, 2023)

Thanks to Matt Whitman, Bob Casey, and Jan Kitchel, whose analysis of this case contributed to my report (and to this list of takeaways).

- De novo review of a decision in equity is not a matter of right and is available only in the discretion of the court. A trial judge's findings of fact in equitable matters such as will contests gets the same deference from the Court of Appeals as a jury verdict.

- Under *Reddaway*, a confidential relationship between the testator and the beneficiary (the alleged influencer) + suspicious circumstances (based on factors listed in Reddaway) will create a rebuttable inference of undue influence and shift the burden of production to the beneficiary.

- Although the burden of production may shift to the alleged influencer, the burden of persuasion remains with the person contesting the will.

- The use of an independent lawyer to prepare a will creates a high hurdle for a will contestant alleging undue influence. The corollary is that a will created through the use of a do-it-yourself will program will be more vulnerable to attack.

After Nettie Schoolcraft died, her granddaughter, Maycie Williamson, filed a petition to probate a will executed in 2018. Decedent's son, Eddie Zielinski, petitioned the court to admit a will executed in 2020. Williamson objected, arguing that the decedent lacked testamentary capacity, and that the will was the product of undue influence. The court found that Zielinksi met the burden of production and proof as to capacity and that there was no undue influence. The court admitted the 2020 into probate.

On appeal, Williamson argued that the decedent did not know the nature and extent of her property and that she therefore lacked testamentary capacity. When a will is executed in due form, there is a presumption that the testator is competent. Thus, the contestant has to rebut that presumption. The parties had stipulated that the full amount of sale proceeds from the sale of some properties had been deposited into decedent's credit union account. Williamson argued that

decedent's belief that Williamson had misappropriated her money was false, given that stipulation, and, therefore, the decedent did not understand the extent of her property. The trial court reviewed information about the decedent's knowledge of the accounts and found that she had testamentary capacity. The appellate court found no error in that determination.

Zielinski did not dispute the finding that a confidential relationship had existed, so the court turned to the question of suspicious circumstances. Williamson raised three factors: a change in the testator's plan of disposing of her property, susceptibility to influence, and independent advice. The opinion discusses each of these factors and affirms the lower court's decision.

As with all undue influence cases, the factors are case-specific. Most interesting here is the description of the role of the estate planning lawyer in providing independent advice. Zielinski was present at some of the meetings with the two lawyers, but he had no prior relationship with the lawyers and the decedent met with each of them without Zielinski present. Zielinski was not present when the decedent executed the will. The record showed that the decedent gave specific instructions to the lawyer who prepared the will, and no evidence showed that Zielinski spoke to the lawyer about the content of the will. Although the trial court found that the evidence showed the lawyer's independence, the reference in the opinion to meetings that included Zielinski is a reminder of the importance of meeting with clients alone, especially initially.

The case generated comments on the Estate Planning listserv that are worth sharing. Matt Whitman's comments are mostly incorporated above, but his post is worth reviewing if you're on the listserv. In addition, I'm pasting parts of two posts, with the authors' permission. Bob Casey wrote about the importance of independent legal advice:

> I'm an estate litigator who usually represents contestants, rather than respondents. When a new possible case appears, the very first thing I want to know is whether the document at issue was executed on basis of independent legal advice:
>
> - Who drafted it?
> - Who was present when it was executed?
> - Did the signatory consult with his/her own attorney, outside the presence of people who might benefit?
>
> How did the signatory get to the attorney's office?
> - Who paid the attorney's fee?

Jan Kitchel summarized his experience with undue influence cases:

> I have several observations on the Reddaway factors. They can bleed over into each other.
>
> 1. An independent attorney is important. If bad actor procures the attorney (calling, e-mailing, paying the attorney, sitting in), then it can be argued that the attorney is not testator's attorney, but procurer's attorney. So those two factors bleed into each other.

2. A change in testamentary scheme bleeds into the unnatural gift. If the scheme always was "all to the kids share and share alike," then cutting out one or more kids is a big change and also unnatural.
3. Never give up your lack of capacity argument. The physical and mental well-being can cover both capacity and susceptibility to influence. The latter is a Reddaway factor.
4. Secrecy is a minor factor, but if it's coupled with an unnatural beneficiary, it can gain importance. Most people don't trumpet about their estate plans. But they will often tell the kids that they all get equal shares. Secrecy in shifting to the care-giver can gain importance as a Reddaway factor.
5. Confidential relationship is a gate-keeper to the suspicious circumstances. I don't think a confidential relationship with a close family member is unnatural, or necessarily a downhill slide to victory, but a confidential relationship that is new, with an unnatural beneficiary, gets you on the downhill run. Keep in mind that finding a confidential relationship is a low hurdle and is all in the tellin'.

In my humble opinion, the most important factors are independent counsel, procurement, health, and unnatural gift.

Also keep in mind that the drafting attorney will want to defend his or her work, and so there can be some bias there. Couple that with procurement and other factors, and you can talk your way around the attorney's testimony.

8. Dehkordi Overruled - FAPA Requirement of Finding "Imminent Danger of Further Abuse" Applies Only at Initial Proceeding and Not for Continuation or Renewal

***K.E.B. v. Bradley,* 327 Or. App. 39 (Jul. 12, 2023)**

K.E.B. v. Bradley overrules *J. N. D. v. Dehkordi,* 309 Or. App. 198, 481 P.3d 422 (2021*)* with respect to the standard a court should apply in determining whether to renew a Family Abuse Prevention Act (FAPA) restraining order under ORS. 107.710(2).

In *Dehkordi*, the Court of Appeals followed the standard set forth in *A.M.E. v. Biehler*, 203 Or. App. 271, 124 P.3d 1256 (2005), a case that involved a motion to terminate a stalking protective order. The court applied the case to the FAPA context and concluded that the requirement for the renewal of a FAPA order was the same standard as that required for the entry of the order: a finding of imminent danger of further abuse by the respondent. However, as the court points out in *Bradley*, the court failed to consider that the legislature had, in 2019, amended FAPA to lower the standard for continuing a restraining order. The amendment altered the continuance standard, which *Bradley* applies to a request to renew a restraining order.

The court explains:

It is no longer necessary that the trial court find an imminent danger of further abuse, as previously required at the continuation stage; it is now enough for the court to find that

> "[t]he petitioner reasonably fears for the petitioner's physical safety." ORS 107.716(3)(a)(B).
>
> * * *
>
> Moreover, the nature and purpose of the 2019 amendment make clear that the legislature intends the "imminent danger of further abuse" requirement to apply only at the initial stage. It would make no sense given the overall scheme to construe ORS 107.725 as requiring more for renewal than ORS 107.716 requires for continuation.

The court concludes: "The restraining order may be renewed upon a finding that '[a] person in the petitioner's situation would reasonably fear further acts of abuse by the respondent if the order is not renewed[,]' ORS 107.725(1)(a), regardless of whether any 'further act of abuse' has occurred, ORS 107.725(2)." The petitioner need not show a finding of imminent danger of further abuse.

9. No-Contest Clause

***In the Matter of the John B. Fenner Revocable Living Trust, Dated August 5, 1998, as Amended*, 329 Or. App. 678 (Dec. 20, 2023)**

Unpublished opinion. This is a nonprecedential memorandum opinion pursuant to ORAP 10.30 and may not be cited except as provided in ORAP 10.30 (1).

- No contest clause did not apply to a successful challenge to an amendment to the trust, because the severability provision in the trust treated that invalid amendment as void *ab initio*.

Roberta Fenner served as trustee of her father's trust from 2008-2011. Roberta's sister, Hillary Fenner, and the successor trustee for the trust objected to Roberta's final accounting. Hillary also filed an action alleging breach of trust. The claims were consolidated, and the trial court entered various judgments against Roberta. She appealed.

One issue was Roberta's argument that Hillary triggered the trust's no-contest clause by stating that Amendment Six was not valid. Roberta argued that Hillary's refusal to stipulate that the entire trust, including Amendment Six was valid, "amounted to an 'attempt to contest or oppose the validity of [the] agreement, including any amendments thereto.'" The no-contest provision provided:

> If anyone, other than me, shall in any manner, directly or indirectly, attempt to contest or oppose the validity of this agreement, including any amendments thereto, *** then in such event such person shall forfeit his or her share, cease to have any right or interest in the trust property, and shall be deemed to have predeceased me."

The trial court had ruled that Amendment Six was invalid, due in part to the settlor's being "disabled and incapacitated" at the time he purportedly executed Amendment Six. The trust instrument also provided:

> [i]f any provision of this agreement is declared by a court of competent jurisdiction to be invalid for any reason, *** the agreement shall be construed and enforced as if the invalid provision had never been included in this agreement.

Therefore, concluded the Court of Appeals, the trial court's ruling that Amendment Six was invalid foreclosed any argument about the no-contest clause. The severability provision directed that an invalid provision be treated as void *ab initio*. Hillary had not challenged the trust or the other amendments.

10. Right of Survivorship Denied Because Couple Ordered to Sell Property in 2011 (2011 Judgment Enforced)

***Kerridge v. Jester*, 316 Or. App. 599 (Dec. 29, 2021)**

Kim Jester and Dan Webb were in an unmarried relationship. When they ended the relationship in 2011, the court ordered Jester to move out of the home they had shared and ordered them to sell the house and divide the proceeds. Jester did move out, but Webb remained in the house, with title held in both their names with right of survivorship. When Webb died, Jester wanted the entire property.

The trial court granted the motion of the personal representative of Webb's estate to enforce the judgment ordering Jester to cooperate in selling the property and sharing the proceeds. The Court of Appeals affirmed.

Jester had argued that the right of survivorship was not extinguished by the 2011 judgment and that when Webb died, she became the owner of the property. She argued that under ORCP 71B(1)(e), a court may grant relief from a judgment if "it is no longer equitable that the judgment should have prospective application." The court rejected Jester's argument that the "purported change in title would make a prospective enforcement of the judgment inequitable." (The court did not decide whether the judgment did or did not extinguish the right of survivorship.)

11. Attorneys' Fees Denied After Claim Voluntarily Dismissed

***Chinese Consolidated Benevolent Assn. v. Chin*, 316 Or. App. 514 (Dec. 22, 2021)**

After the Chinese Consolidated Benevolent Assn. (CCBA) held an election, Yu and Hui claimed that they had been elected as the CCBA's president and vice president. Due to irregularities, the election was not certified by the accounting firm hired to administer the election. The CCBA sued Yu and Hui seeking a declaration that the election was null and void and that the officers in place before the election would continue until a new election could be held. The suit also sought to enjoin Yu and Hui from making statements on behalf of the CCBA.

Before a hearing on a motion for a preliminary injunction, the defendants filed a special motion to strike. The court then held a hearing on the preliminary injunction and denied the request. About two weeks later the CCBA voluntarily dismissed its suit. No hearing was held on the special motion to strike.

The defendants sought attorney fees under ORS 31.152(3). The trial court denied the request, concluding that the statute did not authorize an award of fees because the defendants had not obtained a ruling in their favor on the merits of their motion and evidence in the record supported the dismissal of the suit for reasons unrelated to the motion. The Court of Appeals agreed.

12. Name Change and Gender Change for Incarcerated Person

***Matter of Jondle*, 317 Or. App. 303, 506 P.3d 480 (Feb. 2, 2022)**

An inmate who was a transgender woman filed a petition to change her legal first name and legal sex. The trial court, without a hearing, denied the request for the reason that it was "not in the public interest for petitioner's name and sex to be legally changed." The inmate appealed, arguing that the court could not base the decision solely on the petitioner's criminal convictions or incarceration and that the record contained no evidence that either change was sought for a fraudulent or improper purpose. The appellate court agreed with the petitioner, vacating the judgment and remanding, "[b]ecause neither the circuit court's judgment denying petitioner's change of legal name and sex nor the record contains any indication that petitioner's change of legal name and sex was inconsistent with the public interest…."

The court analyzes the meaning of ORS 33.410, the statute authorizing the legal change of name: "The change of name shall be granted by the court unless the court finds that the change is not consistent with the public interest." The court concludes:

> a circuit court may deny a change of legal name only if the record contains evidence that the change of legal name is inconsistent with the "public interest"—that is, where the record contains evidence that the change of legal name is sought for some purpose harmful to the wellbeing of the general public, including, but not limited to, fraud, dishonesty, misrepresentation, evading creditors, or interfering with the rights of others.

The opinion provides a thoughtful analysis of the meaning of the statute, including a description of the history of the statute and the common law rule for a name change.

The change of legal sex may be ordered in the same manner as the change of name, and the petitioner argued that the word "may" in the statute was intended to mean that the order was mandatory unless the petitioner "failed to provide a valued and legally adequate attestation of having undergone appropriate treatment to affirm gender identity." The court held that the statute gave the court authority to order the change of legal sex but did not impose a mandatory duty to do so. However, the court concluded that the same standard that applies to a change of legal name applies to a change of legal sex. The court's authority to order or deny a change is limited by the public interest standard.

13. Name Change – Trial Court Should Construe Petition Liberally re Whether Request Was for a Future Change

***Matter of Eaton,* 321 Or. App. 318, 515 P.3d 921 (Aug. 10, 2022)**

Petitioner, who was incarcerated and awaiting trial on criminal charges, petitioned for a simultaneous change of legal name and sex. The trial court denied the petition, because the petitioner requested a *future* change. The Court of Appeals held that the trial court failed to liberally construe the petition, as required by ORCP 12 and erred by not applying ORCP 12 B to disregard errors that did not affect substantial rights.

The petition had requested that the name change not take effect until after the criminal case was completed, but the Court of Appeals said that a plausible construction of the petition was that it did not contemplate only a future change. The court remanded the case for consideration on the merits under *Matter of Jondle*.

14. Dissolution of Marriage, Property Division, and Inherited Property

Five cases addressed division of property in a dissolution of marriage and considered the effect of an inheritance received (or to be received) by one of the spouses.

In a dissolution of marriage, ORS 107.105(1)(f)(C) creates a rebuttable presumption of equal contribution for assets acquired during the marriage, including the appreciation of assets brought into the marriage. A party seeking to rebut the presumption must prove, by a preponderance of the evidence, that the other spouse's efforts during the marriage did not contribute equally to the acquisition of the asset. If the presumption is rebutted, the court considers equitable factors and uses its discretion to distribute the asset based on what is just and proper. If a party proves that the asset was acquired free of contributions from the other spouse, the court can award the asset separately to the party who has overcome the presumption of equal contribution. *Matter of Marriage of Craven*, 326 Or. App. 709 (2023) (citing *Kunze and Kunze*, 337 Or. 122, 135, 92 P.3d 100 (2004)).

***Matter of Marriage of Craven,* 326 Or. App. 709, 533 P.3d 818 (Jul. 6, 2023)**

- Appreciation on a separate asset was divided equally where marital assets were used to pay income taxes on the appreciation.
- A prospective inheritance from a parent should not be considered when the parent was still living.

In this case an investment asset was Husband's separate asset, but the trial court awarded appreciation on the asset equally to the two spouses. The trial court determined that the use of marital assets to pay income taxes on the appreciation indicated Wife's contribution to the appreciation. The Court of Appeals agreed that Wife had made some contribution to the appreciation but remanded for a determination of the extent of the contribution. The trial court had erred in determining that Husband had not overcome the presumption of Wife's equal contribution.

Husband also argued that the trial court's division of property was not just and proper because the court failed to consider Wife's prospective inheritance from her father. The Court of Appeals agreed with the trial court that, given that Wife's father was still living, consideration of the potential inheritance would have been speculative.

Matter of Marriage of Brush, 319 Or. App. 1, 509 P.3d 124 (Apr. 13, 2022)

- An inheritance kept separate was not subject to an equalizing judgment.

Wife petitioned for dissolution of marriage, and the Circuit Court order Wife to pay an equalizing judgment of $125,000 from her inheritance form her father. Wife appealed, and Court of Appeals remanded, finding that the Circuit Court had not applied the statutory exception for gifted property to the presumption of equal contribution. The Circuit Court again awarded $125,000 from the inheritance to Husband. Wife again appealed and this time the Court of Appeals awarded Wife's entire inheritance to her. The Court of Appeals concluded that the trial court abused its discretion by misapplying the statutory and equitable factors in dividing the property.

Wife had received an inheritance from her father in 2007, and Wife kept the inheritance separate, to protect it from Husband's creditors. Husband had made financial mistakes during the marriage, including a number of failed business ventures. The couple separated in September 2009, and Wife moved out of the family home. Wife petitioned for dissolution of the marriage in October 2009. Husband stopped paying the mortgage on the home, which was in his name only, and Wife did not contribute from her inheritance to prevent the foreclosure of the home. The Circuit Court correctly applied the statutory factor that the presumption of equal contribution did not apply to the inheritance because Wife had kept the property separate. The Circuit Court then applied equitable considerations under *Kunze and Kunze*, 337 Or. 122, 135, 92 P.3d 100 (2004) in determining a "just and proper" division of the property. The Circuit Court concluded that because Wife had refused to use part of the inheritance to save the home from foreclosure, Husband was entitled to an equalizing distribution of $125,000.

The Court of Appeals held that Wife's inheritance, having been kept separate, could not be used for an equalizing distribution. Further, the court found that the Circuit Court improperly applied the equitable considerations. Wife was entitled to keep the entire inheritance.

Matter of Marriage of Coates, 318 Or. App. 772, 508 P.3d 59 (Apr. 6, 2022)

- An inheritance not kept separate during the marriage was subject to division.

The Court of Appeals affirmed the trial court's determination that a house inherited by Husband during the marriage was a marital asset subject to division. (The Court of Appeals also affirmed the trial court's other decisions.)

The Court of Appeals accepted the trial court's determination that the house was not kept separate. Wife had testified "about the parties' joint use of the property and the intertwined nature of the family finances that were used to maintain and improve the property." The Court of

Appeals added that even if the property was not a marital asset, the trial court could include the property in the division of assets, because *Kunze* explains "that the 'just and proper' inquiry takes into account various social and financial objectives of dissolution in determining whether the division is equitable.

Matter of Marriage of Morrison and Chierichetti, 321 Or. App. 491, 516 P.3d 1196 (Aug. 31, 2022)

- Although Husband rebutted the presumption of equal contribution, Wife was awarded one-half the equity in two houses based on an analysis of commingling and other factors.

Husband used premarital assets to make a down payment on a house used by the couple as their marital home. Husband later used money inherited during the marriage to provide the down payment for a second property. The trial court concluded that the down payment on the first house was not subject to the presumption of equal contribution, because the house was purchased before the marriage. The second house was purchased during the marriage, but Husband had rebutted the presumption of equal contribution because the down payment came from his inheritance.

The trial court then considered whether a "just and proper" distribution would give Wife a portion of the assets used to buy the two properties. The court determined that the contributions had been commingled to such an extent as to become part of the marital estate. Further, a number of facts showed Husband's intent to share the value of the contributions with Wife: the property was held jointly; the parties intended to reside in one of the properties; Wife continued to reside in the first property even after Husband moved out; the parties purchased the second property where they intended to live and held title jointly; Husband's will gave the majority of his estate to Wife; the parties decided, after consideration, not to execute a prenuptial agreement; Husband testified that he intended the properties to be owned by both parties "in marriage;" and Wife controlled the renovation decisions for both properties. In addition, the court considered as equitable factors the fact that Wife had given up a business in reliance on Husband's encouragement to rely on him for her financial needs. The Court of Appeals upheld the trial court's decision to award Wife one-half of the equity in the properties, based on a proper analysis of commingling and consideration of other factors.

Matter of Marriage of Barzilay, 329 Or. App. 250, 541 P.3d 235 (Nov. 29, 2023)

- Property acquired by gift and kept separate must be awarded to spouse that acquired and held it.

The part of this case involving property acquired by gift involved property located in Peru. Wife's parents had purchased the property in 2009, built a house on the land, and moved into the house in 2018. In January 2014, wife acquired title to the property during a trip to Peru. A document memorializing the transfer described it as a sale and recited that wife had paid $8,000. Wife testified that she had paid nothing to her parents, and wife's mother testified that the transfer was a "symbolic sale" and did not involve the exchange of money. Wife's mother

said she had been advised to use the form that made the transfer appear to be a sale. Wife's parents transferred the property to wife because they were ill and worried that they would die. Wife verbally agreed that she and her sister would share the property after their parents died.

The trial court's initial letter opinion dividing the property had found that the transfer was a gift. A month later, without additional testimony but after husband filed a letter objecting to the trail court's first letter opinion, the trial court issued a second opinion letter treating the property as marital property, subject to the presumption of equal contribution. The court awarded the property to wife and its value was used to increase the equalizing payment due from wife to husband.

The Court of Appeals granted limited *de novo* review of the characterization of property located in Peru, finding that the trial court's decision to revise its initial finding in this manner "goes against reason and the substantial weight of the evidence." The Court of Appeals found that the property was acquired by gift and kept separate and therefore should not be considered marital property.

15. Son of One of Joint Settlors of Revocable Trust Did Not Have Standing for Himself or for His Mother; Attorney Fees Awarded to Other Settlor of Trust

Matter of Virginia Worley Revocable Living Trust, 318 Or. App. 127, 507 P.3d 814 (Mar. 2, 2022)

- The beneficiary of a revocable trust cannot enforce the beneficiary's interest while the settlor is alive.

- An interested person can intervene in the administration of a trust, but "interested person" is someone who has responsibilities, duties, or interests with respect to a trust and not someone with a family attachment to a person whose assets have been put into the trust.

- A person who brings a claim with no objectively reasonable basis for the claim will be liable for attorney fees.

Larry Lewis is the son of Virginia Worley by a first marriage. In 2006 Virginia Worley married James Worley. In late 2015, Virginia and James established a joint revocable trust, naming the two of them as settlors and as trustees. In 2017 Lewis filed an action against James, seeking an accounting of the trust, removal of James as trustee, and a surcharge of James as trustee. Lewis also brought an elder abuse claim against James. James moved to dismiss the petition, arguing that because the trust was revocable, Lewis lacked standing.

Also in 2018, Lewis petitioned for appointment of a conservator for Virginia, and the court appointed the Pioneer Trust Bank as conservator.

James moved for summary judgment on the trust claims, because as a beneficiary of a revocable trust, Lewis had no right to receive information about the trust. The trial court denied the motion, saying that Lewis had the right to pursue some of the claims, both as Virginia's son

(an interested person interested in the welfare of his mother) and as a beneficiary James could seek removal of the trustee. The court said that only the conservator could bring a claim for a surcharge.

On the trust claims, the court ruled that James, as trustee, must submit an accounting to Pioneer Trust Bank, as conservator. All parties then requested attorney fees. The court awarded fees to Lewis and not to James. James appealed, arguing that he was entitled to fees because Lewis did not have an objectively reasonable basis for pursuing the trust claims against a trust that was still revocable. James argued that for the same reason Lewis was not entitled to fees.

The Court of Appeals concluded that James did not have an objectively reasonable basis for seeking an accounting for the trust. In the case of a revocable trust, ORS 130.510(1) bars beneficiaries of a revocable trust from enforcing their interests while the settlor is alive. The court discussed *Tseng v. Tseng*, 271 Or. App. 657, 352 P.3d 74, *rev. den.*, 358 Or. 69, 363 P.3d 500 (2015) in connection with the determination that a beneficiary of a revocable trust had no power to enforce the beneficiary's interest as long as the settlor was alive.

ORS 130.050 permits an "interested person" to "intervene in the administration of a trust" but not to bring claims on their own behalf. The court says it does not define "interested person" as the term is used in ORS 130.050, but the court explains that an interested person is "one who falls within defined categories of people who have responsibilities, duties, or interests with respect to a trust—and not to other individuals merely because of the emotional or family attachments to somebody whose assets have been put into a trust." The court concluded that Lewis did not have rights to pursue trust claims as an interested person under 130.050.

The Court of Appeals also held that Lewis had no basis, under ORS 130.625, to seek to removal of Lewis as trustee, because Lewis was the settlor and trustee of a revocable trust.

Because Lewis had no objectively reasonable basis, under either ORS 130.050 or ORS 130.625, for bringing the trust claims, James was entitled to an award of attorney fees for having to defend against those claims, and Lewis was not entitled to attorney fees for bringing the claims.

16. Decision to Administer Psychotropic Medications – State Hospital followed Applicable Procedures

***Taylor v. Oregon State Hospital*, 319 Or App 620 (May 18, 2022)**

Jeffrey Taylor was diagnosed with schizophrenia and experienced auditory and visual hallucinations, delusions, and paranoia. He received treatment, including psychotropic medications that had been beneficial. The medications caused restlessness as a side effect, and Taylor stopped taking the medications. After he stopped the medications, the delusions returned, and he killed his roommate's dog. He was found guilty except for insanity of animal abuse and admitted to the State Hospital. The Psychiatric Security Review Board found good cause to administer psychotropic medications to Taylor without his informed consent. He requested a

hearing, and the final order issued by an administrative law judge from the Office of Administrative Hearings for the State Hospital denied rehearing and reconsideration.

Taylor, proceeding *pro se*, argued that the State Hospital failed to follow the administrative rules concerning informed consent and the administration of "significant procedures" (psychotropic medications) in the absence of informed consent. The Court of Appeals that State Hospital followed the applicable procedures and affirmed the ALJ's decision.

17. A Horse Still Isn't a Legal Person

***Justice By and Through Mosiman v. Vercher*, 321 Or. App. 439 (Aug. 31, 2022), rev. den'd 370 Or. 789, 524 P.3d 964 (Feb. 23, 2023)**

- Oregon law could recognize an animal as a legal person or could permit someone to sue on behalf of an animal, but that change in the law would be up to the legislature.

Kim Mosiman, the Executive Director of Sound Equine Options (SEO), filed a complaint as the guardian of Justice, a horse, claiming negligence against Gwendolyn Vercher, the former owner of Justice. The court held that only a human being or a legislatively-created legal entity is a person with the capacity to sue. A horse, being neither, could not bring a suit.

A neighbor reported abuse of Justice in March 2017. Vercher voluntarily surrendered custody of Justice to SEO, and Mosiman arranged for treatment and then cared for the horse. Vercher agreed to pay restitution to SEO for the costs of care prior to July 6, 2017. In August 2017 Mosiman created the Justice Equine Trust as a trust for an animal under ORS 130.185.

Mosiman argued that she was the de facto guardian for Justice and that a court could name her as Justice's legal guardian. The court, noting that it need not make a determination as to a possible guardianship, found it "doubtful that a court could exercise discretion, on its own motion, to appoint a guardian ad litem to act on behalf of an animal in a legal action."

Mosiman argued that animals qualify as legal persons because they are "entities who individually bear legally protected rights under Oregon's animal cruelty law." The court concluded that "nothing in the animal welfare statutes suggests that an animal is a legal entity capable of bearing and exercising its own rights." Oregon law continues to regard animals as property, even though the law imposes duties on their owners with respect to their care and welfare. The opinion reviews the evolution of the common law regarding care of animals and concludes: "We emphasize that our decision does not foreclose Oregon law from ever recognizing an animal as a person or a legal entity, but also that the courts are not the proper forum to achieve that goal." In a footnote to the first clause in the quoted sentence, the court adds: "Nor do we foreclose the possibility that, as the trial court aptly observed, the legislature could create a limited statutory cause of action allowing a person to sue on behalf of an animal for specified damages in specific instances."

E. Oregon Tax Court, Magistrate Division

July 1 is the Determinative Date for Property Tax Exemption

***Skatechurch, inc. and David W. Smith (Skatechurch director) v. Multnomah County Assessor*, 2024 WL 1090615 (Or. Tax Magistrate Div.) (Mar. 13, 2024)**

Skatechurch "is a religious, nonprofit organization serving skateboarders in Portland since 1987" and it is exempt from taxation under IRC 501(c)(3). Skatechurch closed on property on July 5, 2023, and began using the property for outreach events shortly thereafter. Skatechurch filed an exemption application, but the application was denied for the 2023-2024 tax year. The Oregon statutes that provide for tax exemption require that the property be put to a charitable or religious use as of July 1 for the following tax year (July 1-June 30). Because Skatechurch did not take ownership until July 5, the property could not be exempt for the 2023-24 tax year. Skatechurch argued that the use of July 1 as the determinative date was arbitrary and discriminatory and that the use of one fixed date violates equal protection because a religious organization that bought exempt property would be treated differently from an organization that bought taxable property.

The Tax Court applied the rational basis test, which requires that "a legislative classification have a 'rational relation to some legitimate end.'" The court cited *Christian Life Fellowship, Inc. v. Dept. of Rev*., 12 OTR 94, 96 (1991), which said, "denying exemption to property whose ownership or use changes after the fiscal year begins is a rational way to achieve stability in taxation." The court explained that property acquired after July 1 maintains its status for that fiscal year. A taxable property remains taxable, even if held by a charitable owner, and an exempt property remains exempt, even if held by a taxable entity.

Information about Skatechurch, Inc. from its website:

> The Vision: In dependence upon God, through Gospel proclamation, relationship, and example, we desire to enter into the lives of skateboarders to present an accurate picture of Jesus Christ resulting in the winning of souls and the transformation of lives.
>
> Rules: Skatechurch is more than a place to skate. We exist to tell skaters about God. If you come to skate you MUST attend the Bible Talk halfway through the session. If you are not willing to hear about God then Skatechurch is not for you.
>
> Beyond that, we simply ask that skaters obey the staff, respect other people and church property, skate safe, and have fun!

And from Skatechurch's 990, found on Guidestar:

> For 2022, Skatechurch reported $257,863 in contributions and grants, plus $815 of investment income. Expenses were salaries ($211,347) and other ($47,767). Total assets at the end of the year were $717,716.

Other Changes and Additional Resources

A. DHS Notice Requirements Amended

Rule Title: Delivery of Required Notices to the Estate Administration Unit
Notice Filed Date: 04/28/2023
Rule Summary: OAR 461-135-0834 is being amended to change requirements for notices to the Estate Administration Unit regarding wrongful death probates.

For a "no asset wrongful death" probate, the long-form death certificate must be sent the Estate Administration Unit. The listserv reports that some cases have occurred where people have confused survivorship claims (that belong to the estate) with wrongful death claims (that belong to the heirs). DHS wants to be able to see the cause of death as recorded on the death certificate, so they want to see the long form.

B. New and New Editions of Oregon State Bar Books

1. Administering Oregon Estates (Oregon State Bar: 2023)

2. Nonprofit Law in Oregon (Oregon State Bar: 2024)

3. Administering Oregon Trusts (Oregon State Bar: 2024)

C. Problem with ONE System's Computation of Countable Resources

Kristianne Cox posted the following on the Elder Law Listserv on August 31, 2023:

There are four "tests" under OAR 461-160-0580 to calculate the Community Spouse Resource Allowance (CSRA). The CSRA is the amount of countable resources a spouse (who is not applying for Medicaid and who remains living in the community) may keep. The "Medicaid spouse"—the other spouse—may keep $2,000.00 in countable resources. The four tests are described in the four subsections A., B., C. and D. under 461-160-0580(2)(c.) To learn more, see page 17 of Rebecca Kueny's chapter in the January 28, 2022 OSB program handbook Medicaid Boot Camp: A Client Walks into Your Office, Then What? Consultation Phase.

Red flag alert: The ONE system does not calculate test "D." correctly. I received written confirmation of this by email today from a Multnomah Medicaid case manager. Mind you, I have not received any assurances that anyone plans to fix the problem with the ONE system miscalculation of this rule subsection. GIGO will continue until the Medicaid attorneys apply enough pressure on APD. Do your CSRA calculations under test "D." by hand. Earmarks of a Medicaid case that may trigger this subsection are both spouses having low income (for example, each one receives only Social Security) and a denial of Medicaid benefits because of having excess countable resources.

* * *

My points are: 1) If you are experienced in Medicaid, run the "D." test math by hand. The ONE system isn't currently identifying applications where the CSRA ought to be increased by

test "D." 2) If you are not experienced with Medicaid but are bravely trying to learn it, email me and ask for my worksheet. Also, read Rebecca Kueny's CLE materials. Do not take accept anyone on the Medicaid side's conclusion that test "D." does not apply to your married client's Medicaid application. The ONE system is producing false negatives. Protect your client. Do the math yourself.

D. Updates on Work Group Working with DHS on Problems with ONE System

Rebecca Keuny posted this update on both the estate planning and elder law listservs:

For the last 2+ years, a few attorneys have been working with DHS to discuss the negative impact of the ONE System on our Oregon community. This cohort of attorneys and DHS high level management ("The Work Group") has increased over the years. Here is what the Work Group has done after 2+ years of hard work and conversations:

1. Reinstated over 20,000 Oregonians' long-term care benefits just this year.
2. Informed long-term care facilities to return private pay funds for improper denials from April 2023-present. DHS is sending new SDS 512s to facilities to course correct the amount owed by the client; DHS will pay the facilities the share that should have been covered by DHS but-for the denial.
3. The SDS 512 and Resource Assessment are now actively being mailed out and are more accurate. (There is still work happening here, it's not a final product.)
4. DHS is now providing documentation of the calculation of the service liability payment and all the underlying figures that comprise this calculation, including the DHS calculations of the Community Spouse Income Allowance. This information is now included in the MED-005 Notice of Medical Eligibility.
5. In August 2023, DHS designated long-term care specialists to handle complex long-term care applications (e.g. matters involving married applicants, trusts, allowable resources transfers, etc.)
6. Lastly, this week, DHS is working on implementing new Notices of Termination which the Work Group has reviewed. This is not the final Notice – these notices will take months/years to improve. However, these updated Notices are immensely better than the prior few years of Notices as they do specify most of the information we requested. It is not perfect, but it is so much better.

For those who do not do Medicaid, please let me explain briefly. The ONE System was implemented in Oregon in 2020. The ONE System is an online application system and it does not allow for attorneys to have access to the system. For those doing Medicaid benefits, it has been a brutal few years navigating this new system. You add in DHS turn over and COVID…well, it has been truly awful. So, I wanted to start off 2024 with some very positive news!

Here is some of what the Work Group has cited as concerns:

1. Notice of Termination that have lacked proper due process provisions. Specifically, the notices since the ONE System have not cited the direct rule or the individualized

information of the client. Therefore, it has been impossible for anyone to understand why there was termination. Additionally, it did not provide adequate information on how to request a hearing.
2. Language issue for the Notices, as they are not in all languages.
3. Other types of Notices, including Redeterminations.
4. Need for teamwork. We are creating subcommittees for multiple categories. We will let you know when we are ready to fill the subcommittees up with attorneys!
5. Resource Assessments. Currently, the ONE System does not play well with married couples looking for long-term care (OSIPM) coverage.
6. Accuracy of the SDS 512.

I really want to thank the Work Group who has been working on this matter diligently. I will continue to give updates (more regularly) on behalf of the Work Group.

If you have questions, comments, concerns, or are noticing issues that need attention, please contact Julie Meyer Rowett, Beth Englander, or me.

E. Research in the Bar's Listservs

1. Estate Planning Newsletter

The Oregon State Bar provides access to individual newsletters at the following website:

https://estateplanning.osbar.org/newsletters/

Warren Deras explained how he creates a searchable library of the newsletters:

I have saved the back issues (all the way to Volume 1, number 1, in 1984) in searchable PDF files, then combined them to a single large (really large!) file. Each year I add the new ones. I used to use Adobe Acrobat to combine files, but now I use Nitro Pro. At some point it got a little unwieldly and I split the file at 2010 into two files. I don't have an index; I just run a search when I'm looking for something.

2. Elder Law Newsletter

The Oregon State Bar provides access to individual newsletters, and to an index created by Editor Carole Barkley, at the following website:

https://elderlaw.osbar.org/newsletters/

F. Simple Estate Affidavit

Heather Gilmore posted a link to the new standardized form for the simple estate affidavit: https://www.courts.oregon.gov/forms/Documents/EN-ProbateSmallEstate.pdf

G. Notarization – Secretary of State Resources

Heather Gilmore posted these links:

The Secretary of State's Remote Online Notarization page:
https://sos.oregon.gov/business/Pages/remote-online-notarization.aspx
The FAQ: https://sos.oregon.gov/business/Pages/remote-online-notarization-faq.aspx

A chart comparing traditional notarization, electronic notarization, and remote online notarization, all of which are accepted in Oregon:
https://sos.oregon.gov/business/Documents/notary-guide/traditional-electronic-remote-comparison.pdf

Ms. Gilmore noted that the Secretary of State's office has an advanced class for notaries that includes elder abuse issues and what the notary should do if elder abuse is suspected. The specialized training that someone must take to be a remote notary includes some elder abuse components, but not as much as the advanced training.

H. Advance Directive

The Advance Directive is available in 19 languages on the Oregon Health Authority website. Theresa Hollis posted this the link on the listserv:

https://www.oregon.gov/oha/PH/ABOUT/Pages/ADAC-Forms.aspx

Stewardship Trusts – Still New and Growing in Importance

The Legislature adopted ORS 130.193 in 2019, and the statute became effective January 1, 2020. In the four-plus years since then, at least 48 businesses have transitioned to ownership by a stewardship trust or a purpose trust (using law from another state). Organically Grown Company, the first business in Oregon to use this structure, moved its trust from Delaware to Oregon.

A. Basic Structure

Although the transition to stewardship trust ownership may not involve the entire business, I will describe the structure when it does. In a stewardship trust, the trust owns voting control of a business. A trustee owns the voting stock and is directed in actions taken as the owner by a stewardship committee. The committee must have at least three members and may have more. Members may be elected by stakeholder groups (e.g., employees, family members of the original business owners, customers of the business, owners of nonvoting preferred stock in the business, or community groups with missions that align with the business's activities). A trust enforcer ensures that the stewardship committee and trustee follow the trust's purposes.

B. Gift or Sale

The transfer of ownership can be accomplished through a gift, a sale, or a combination of the two. The tax considerations of either a gift or a sale are similar to those that would apply to an owner giving the property to a family member or selling the property to a third party. A stewardship trust is not tax advantaged, and a transfer by gift is subject to the gift or estate tax.

C. Reasons

When a business is sold to a third party, the new owner may change the way the business operates, for example by putting financial returns above employee welfare or environmental considerations. A new owner may move the business to another state or country or may close the business altogether to reduce competition.

A business owner may choose a stewardship trust structure to avoid these potential consequences of a sale. The stewardship trust structure can protect the owner's vision for how the business should operate, continuing a focus on employee welfare or sustainability. The structure can ensure that the business will stay in the community.

Some stewardship trusts are controlled by employees. The business is operated by employee-stewards who do not own shares in the company (as they would in an ESOP) but benefit through safe working conditions, employee benefits, and profit sharing. Because employees have a direct interest in the profitability of the business, companies using this structure have reported greater employee engagement, less turnover, and improved productivity.

D. Profits

Profits are used or distributed at the level of the business, because the trust will pay income tax on any profits retained at the level of the trust. The business can use excess revenue for research and development, to improve the business's facilities, as profit sharing for employees, or for charitable grants in the community. Some business founders give nonvoting dividend stock to a charitable or social welfare organization, and then the business distributes dividends to that entity (Patagonia did that). Nonvoting dividend stock can also be used to provide a dividend stream for family members of the founder.

E. Resources on Stewardship Trusts

Natalie Reitman-White, Purpose Owned LLC, https://www.purposeowned.com/about

From the Purposed Owned website:

- We offer a unique service as ownership transition consultants. We help leaders of private companies design and implement purpose succession plans, ownership and financing models.
- Our clients come from many industries, but they share values around building a company to last, preserving culture, rewarding stakeholders, self-governance, and creating positive impact in the world.
- We specialize in a new legal form of ownership called the Perpetual Purpose Trusts. We help create plans that allow founders to protect their values while they step aside and new leaders to step in, deepen impact thought codifying purpose commitments, design ways to share governance and rewards with stakeholders, and bring in aligned financing to create regenerative business models.

Susan N. Gary, *The Changing Landscape of Business Succession: How and Why Purpose Trusts Matter*, 18 Ohio State Bus. L. J. 41 (2024).
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4551502

Susan N. Gary, *The Oregon Stewardship Trust: A New Type of Purpose Trust that Enables Steward-Ownership of a Business,* 88 University of Cincinnati Law Review 707 (2019) (symposium on The Business Uses of Trusts). SSRN: http://ssrn.com/abstract=3426845

I'm always happy to talk about stewardship trusts. The best way to contact me is sgary@uoregon.edu.

Chapter 2

Charitable Remainder Trusts: Mystery or Mastery?

Lynda Sands
Attorney at Law
Redmond, Oregon

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OREGON STATE BAR
ADVANCED ESTATE PLANNING
JUNE 14, 2024

CHARITABLE REMAINDER TRUSTS: MYSTERY OR MASTERY?

(These reference materials are to be used in conjunction with the Power Points)

I. FROM START TO FINISH IN FIVE STEPS

A. A Practical Guidance Approach to Working with Charitable Remainder Trusts (CRTs).

Over 46 years of practicing in this field, I discovered I fell into a cadence of five chronological steps when working with CRT clients. For the most part, clients who become interested in CRTs have not yet worked with irrevocable trusts and only have revocable living trusts in their background for comparison. That provides a flawed comparison; thus, a lot of education is necessary to achieve their understanding of what the trust will and won't accomplish and to ensure that the client will be satisfied with this type of long term, irrevocable trust.

Unfortunately, I have inherited quite a number of clients who had CRTs drafted but did not understand the trust at all. They end up frustrated and just wanted to "get rid of this @$#*^&& trust!" For some, we had to terminate the trust, but for others, education and restructuring of investments set the ship aright and they became satisfied with the results.

At first, I used the five steps for my own planning purposes. I later discovered that clients appreciate knowing there are five steps to go through from start to finish and where we are at any given time in the process. It will make your job easier if you use this approach or modify it to fit your practice.

The five steps are:

(1) Understanding motivation, or what made this an interesting concept to the client. You simply cannot design a good trust for the client without both of you understanding their positive and negative motivations. Both type of motivating factors, positive and negative, can lead to successful design from which you draft. But you both have to be "on the same page".

(2) Designing the right structure, including selecting the right type of CRT and its many options, to meet the needs/wants/goals of the client and exploring many issues with the

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client that will lead to proper drafting to avoid problems that otherwise crop up and bite you later. Design must follow client motivations and desires.

(3) Drafting to fulfill the chosen design becomes much easier when steps (1) and (2) are clear to you and the client. However, there is often a gap between the first two planning steps and the third step, drafting, when another advisor or a nonprofit planned or major gift officer has worked through the first two steps but has not fully communicated it to you. I find this gap in communications to be one of the biggest areas of potential errors with CRTs. As the drafting attorney, you need to go through the first two steps with the client even though someone else may have already discussed it with the client. You may also need to discuss it with other advisors to ensure that your draft meets the expectations of the client and the investment advisor can produce sufficient distributable income to fulfill any mandatory payment required by the trust.

(4) Transferring assets to the trustee can bring surprises from time to time. With a thorough study of the design that is needed in step (2) above, some of these issues can be avoided. However, there will be times when the asset transfers unearth unexpected issues. Assets are where most sticky issues occur, both on transfer and on planned sale by the trustee. This can cost you loss of time and earnings if you work on a flat fee basis.

(5) Once the CRT is funded, its operation and administration is critical. The regulations (which are legislative regulations, not interpretive regulations, and therefore bear the weight of law) clearly state that the organization and the operation of the CRT must meet all the rules of Internal Revenue Code ("IRC") section 664 and regulations promulgated thereunder. What is not always mentioned is that many affiliated rules governing the planning or operation of the CRT are not found in IRC section 664 or its regs.

B. In this session, we will go over all five steps, but we will focus more heavily during the in class and webinar session on step three, drafting the trust properly. The outline will cover all five steps and give you areas to watch where rules not in IRC section 664 apply. There is an attachment to this outline as Exhibit #10, Book One of "CRTs: Mystery or Mastery?" There are additional EBooks in the works to flesh other aspects of CRT planning, design, and operation.

Ultimately, I will provide materials on all five planning steps on a new website that you can research. I will explain how that will work in the session. The URL to be used for the new site is www.crtlawyer.com. It will be open to attendees of this Oregon State Bar program at no charge once I have it set up with the remaining EBooks. Currently, I have only Book One available and it is included your materials.

II. MOTIVATION

A. Where Does the Interest in Setting Up a CRT Come From?

Maybe not from you!

Clients somehow hear about CRTs from others they know and then they research it online. Unfortunately, there is a lot of bad information online about CRTs. But there is some good information, too. How do laymen sort out which is which?

Other professional advisors such as financial planners, investment advisors, insurance brokers, CPAs, and others are primary sources of motivators for the person who may become your CRT client. Often they know about CRTs, but do not have depth of expertise.

Nonprofit planned giving or major giving officers who work for nonprofits are often seeking attorneys knowledgeable in the many aspects of philanthropic planning to whom they can refer their donor. They need to know which attorneys will understand how to work with their donor and the nonprofit representative.

Or the client may be one of your existing clients for whom this may be good strategy, but you do not feel comfortable delving into this area. As with other techniques we attorneys hear about in seminars and webinars, the concept may sound good until it is the first time you plan to use it. Then your hesitations develop and you shy away from using the technique. Perhaps the practical pointers in this program will make it easier for you to jump in with both feet and try a CRT for the first time, or perfect what you already know to make you more comfortable using this tax-oriented vehicle with more of your clients.

B. Two completely different ways a CRT is used.

1. Transactionally. This is the one-off, very common use of a CRT, generally to sell an asset to avoid realizing capital gain. This type of client is sometimes not philanthropic at the outset. The financial benefits are the attraction. This type of client needs education so that a long-term solution he or she does not fully understand is not used to solve a short-term problem or issue.

Take care to make sure this short-term thinking does not become a problem for you later. The client must understand the trade of accessible principal for an ongoing value-driven distribution termed “income” which is not truly income other than in the income exception CRTs (NICRUT and NIMCRUT). Percent times value distributions are a different creature.

In addition, the CRT beneficiary or donor-trustee must abide by many restrictive rules over the long years this trust will be in place in his or her life. Lack of knowledge about the functioning over the long term is not an uncommon problem. It may bring the client back into your life, possibly with complaints about how awful this type of trust is (because the client did not take the time to understand it).

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2. Contextually. This type of client will use a CRT in conjunction with his or her financial planning or estate planning. They tend to take more time to learn the ins and outs of living with the irrevocable CRT for many years and therefore, they understand its restrictions as well as its positive benefits and are more satisfied with the end result.

C. Motivators Driving Consideration of the CRT

1. Income replacement. Changing the type of income due to changes in life, such as older clients becoming tired of the 3T's—tenants, toilets and trash—of rental real estate investments. Changing it to a passive income flow becomes very appealing.

2. Conversion from non-income or low income producing assets to income producing assets. Residences, both personal and vacation homes, and even low-profit rentals, fall in this category. Net rental income is not always as great as the client hoped. Reliance on the investment producing appreciation only causes more concern about paying capital gain tax later.

3. Diversification of Portfolio. I call this category the "Stuck Stock" problem. The client either inherited it long ago with a low basis or bought it long ago and it has a low basis. It's the million dollar problem, such as stock with a $50,000 or even a $200,000 basis can cause a potential tax bill of a quarter million dollars or more. Writing a check to the government for a quarter million dollars freezes the client in place. And usually, the client facing this issue is older. Losing about 30% of a portfolio to the government stymies a sale. The client is likely relying on the portfolio for retirement income. Losing a large chunk of asset base to tax is the equivalent of experiencing the most horrible stock market drop from which they feel they cannot recover due to age and shorter remaining time to recoup losses. They may fear this will force them into aggressive investing to recover the tax bite, or they might just need to live on less. Diversifying with a CRT, paying no gain on the transfer and then investing in a tax-exempt environment is attractive.

4. Retirement planning. There are great opportunities to utilize the tax exempt status of a CRT to grow the asset base in a manner very similar to the use of an IRA or qualified plan, but without the RMD, early withdrawal penalties, and in many cases, without the mandatory tax at the ordinary income rates of the IRA or qualified plan.

5. Tax benefits-- deferral, avoidance and use of the trust's tax exempt status. The tax benefits offered in federal tax law make this attractive to many clients. Avoiding the recognition of capital gain on the transfer to the trust, the deferral of income when used for retirement planning, and the utilization of the statutory tax exemption of the trust make this a desirable tool to use alone or in conjunction with other strategies. It is a good IDEA—Income production, Deduction available, Exempt trust, Avoidance of gain on transfer.

6. Philanthropic planning. Not everyone wanting to use a CRT starts out with charitable intent, but everyone using a CRT will end up with charitable intent by nature of the trust that

requires that 100% of its assets must be distributed to one or more qualified charities at the end of the trust term. If charitable intent is not present at the outset, some advisor has to be responsible for helping the client create and understand that intent. The infamous 10% rule is almost always misunderstood and will be explained later in this outline.

D. Send information to a prospective client

Once you suspect the prospect may be interested in using a CRT, you may wish to send two pieces of information to them—the Top Ten Tips in your materials as Exhibit #1 or some version of it that you may wish to redraft, and the CRT Questionnaire also in your materials as Exhibit #2 that we will cover in this session.

This will likely lead to moving you and the client into the series of steps outlined here that will result in a well-planned CRT structure.

III. DESIGN ISSUES

A. Choice of Type of Charitable Remainder Trust.

The explanation of CRTs variations is more thoroughly covered in the Book One in the materials. The CRT has been around in essentially the same form since 1969. In those 56 years, there is a lot of "template thinking" that has developed. Stock goes in an SCRUT, real estate goes in a FlipCRUT, retirement planning is done with a NIMCRUT. But maybe we should be more creative in our thinking.

In the Power Points, we will do a brief review of the two basic types of CRTs, and the four variations of the unitrust version. In the next section, Drafting, we will cover the five varieties in a different way—drafting by the subtraction method. Because the CRT has been around for such a long time, we will not spend much time on explanation of each of the variations. Book One covers that.

The most important point is that each variation, starting with the simplest, the CRAT (charitable remainder annuity trust), builds upon the prior variation by adding one specific feature. That feature is always how the distribution is calculated and made to the "income" beneficiary (called the "Recipient" by the IRS in its sample forms). Each of those specific additional features causes other drafting changes in the trust. We will go through that in session.

B. Income Recipient Issues

1. The permissible payments for the life, lives, or term of years is in a series of graphs in the PPTs.

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2. Choice of form of "income" distribution—CRAT, SCRUT, NICRUT, NIMCRUT and FlipCRUT –will be covered in the section on Drafting.

3. Marital deduction issue. IRC section 2056(b)-(8)(b) is specific to CRTs and allows a marital deduction only if there is no other beneficiary than the spouse. Caution using joint lives for husband and wife, followed by lives for children or term of years for children or others. The addition of others causes loss of the marital deduction on the death of the first to die, making the life estate value of the surviving spouse to be taxable in the decedent spouse's estate unless you can qualify it under 2056(b)(7).

Reg. sec. 20.2056(b)-8(a)(2) allows a marital deduction for a term of years charitable remainder trust (term of years is limited to no more than 20 years).

4. Right to revoke a successor beneficiary's interest is allowed solely by the will of the person revoking, whether the will is probated or not. The cite for a CRAT is 1.664-2(a)(4) and for CRUTs 1.664-3(a)(4).

5. This trust is a valuation driven trust. Valuation for the purpose of setting the "income" payment of all the variations must be done by a qualified appraiser or an independent trustee for "hard to value" or "unmarketable assets" as provided in 1.664-1(a)(7)(i). The definition of "unmarketable assets" is defined in 1.664-1(a)(7)(ii).

6. The concept of "unmarketable assets" as defined in 1.664-1(a)(7)(ii) plays a major role in FlipCRUTs as to what constitutes a valid "triggering event" to change the CRT from a NICRUT or a NIMCRUT to an SCRUT at a later date. This definition is sometimes overlooked or misunderstood or perhaps even ignored by some clients who want to play games with using a very minor asset as a tool to make a flip happen when the bulk of the trust estate is held in publicly traded securities. The client sometimes hears this can be done but does not know the actual rule.

The FlipCRUT is a "Change of Methods" of paying the beneficiary from one of the net income versions of CRUT (NICRUT or NIMCRUT) to a mandatory percent times value SCRUT. This basically breaks the trust into two phases—first it pays the lesser of the stated percent or the net income and once the triggering event happens, the trust changes into an SCRUT requiring a mandatory payment of the percent stated in the trust times the trust's yearly value. There will be more on this in the section on Drafting. It is important to understand what constitutes a valid triggering event to make the change happen.

7. Definition of Income for NICRUT, NIMCRUT and for the first phase of the FlipCRUT is important where investments will include capital gain property held in the trust for growth until distributions are desired. Income is defined in 643(b) and the regulations.

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C. Charitable Remainder Issues

1. Identifying the charity that receives the remainder interest. The IRC section 501(c)(3) describes the various types of qualified charities that can be the remainder interest holder of a CRT of any type. Section 501(c)(3) is an umbrella section that covers both private foundations and public charities. Both types of charity can be the charitable remainderman, but one of the four types of private foundation causes a reduced deductible amount (20% of AGI) to apply. That type of private foundation is the "nonoperating" foundation, or better known as a grant making foundation. It does not operate a charitable program as an "operating" private foundation does. A contribution to an operating foundation qualifies for the same level of charitable deduction as a gift to public charities. Considering that almost all contributions to CRTs are of appreciated property, the 30% of AGI deduction level applies.

You will see in the section on Drafting below that certain IRC sections apply for each of these two types of charities, and certain excise tax sections apply also (Chapter 42 rules). A trust provision stating that the recipient charity is identified as an organization qualified under sections 170(c), 2522(a) and 2055(a) permits the trustee to distribute to any charity, whether it is a private non-operating foundation, a private operating foundation, or one of the many types of public charity. The trust provisions limiting the remainder interest to public charities (and private operating foundations, along with certain other cites) is 170(b)(1)(A), 170(c), 2522(a) and 2055(a). Section 170(b)(1)(A) defines public charities and prohibits gifts of the remainder interest to private non-operating foundations. Inadvertently leaving IRC section 170(b)(1)(A) out of the string cite identifying the permissible charities will cost your client considerable deductibility if he/she intended to receive the higher level of deductibility for the charitable gift in the CRT.

2. Seven topics to consider regarding the charity.

a. Do you really know the correct legal name of the charity? Many charities' websites do not provide their actual legal name. In addition, some charities prefer that gifts go to a related foundation. Or they may need to be designated to a national, regional or local branch of the charity.

b. Are you sure it is a public charity? Check IRS records on www.irs.gov.

c.. Is the charity is good standing? For example, if it failed to file its information tax return (Form 990) for three consecutive years, it automatically loses its exemption.

d. How does your client want to name the remainderman? As vested (named irrevocably) or subject to redesignation or even unnamed?

e. Is there a provision as required for an alternate charity if the named charity(ies) no longer exist or no longer qualify as an exempt organization that may receive deductible gifts?

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f. Is the gift intended to be restricted or unrestricted once the charity receives it? If restricted, is there a clearly stated purpose for its use?

g. Does the settlor or the trustee have the power to make early gifts from the trust assets to the named or another qualified charity?

3. Have you clearly advised the client that there are three ways to provide for the charitable gift? (1)Named and vested (irrevocable), (2) named but subject to the power to change it, and (3) unnamed in the trust agreement but the remainder interest is irrevocably dedicated to one or more charities with a mechanism provided to name the charity.

D. Trustee/Trust Administrator Issues

1. The settlor(s) may be the trustee without this trust becoming a grantor trust (grantor trust status disqualifies a CRT). However, refer to the Step Five material on the 4-tier distribution system and you will see why almost no donor to a CRT will know how to serve as trustee without engaging a professional or commercial co-trustee or a CRT trust administrator. The accounting for the 4-tier system requires specialized knowledge. See Exhibit #3. There are several companies that serve as CRT trust administrator for those clients who do not care to give up control. Generally, the settlor who serves as trustee of a CRT will handle investments and distributions.

In a revocable living trust, clients often name children or other family members to serve as successor trustees. Where the tasks are as complex as in a CRT, finding and naming a qualified successor trustee may be difficult. There are even some institutional trustees that do not know how to administer CRTs.

2. Settlors serving as trustees are not permitted to set their own valuations for other than publicly traded securities. The possibility for conflicts of interest or even fraud with closely-hold or “unmarketable assets” exists. Therefore, if your client is serving as trustee, he or she will need to appoint an independent trustee or engage an appraiser to value unmarketable assets.

The choice of an independent trustee or an appraiser can be made based on the nature of the asset. Certain assets may benefit from a qualified appraiser and other assets may be better valued by an independent trustee. The requirements for an appraiser are the similar to those for the charitable deduction. See section E. below. The trustee or the settlor may select either an appraiser or an independent trustee in any taxable year, depending on how the trust is drafted.

For real estate held by the trustee, an appraisal may be less expensive, especially if it is residential. However, if the trustee holds closely held stock, the cost of an appraisal for the whole company when only a portion of the stock may have been gifted may be prohibitive and an independent special trustee may be preferable and less expensive. The

independent trustee will need to substantiate his/her/its work and write a valuation report for the primary trustee to keep with trust records.

3. Whether a trustee is "independent" is provided in Reg. sec. 1.664-1(a)(7)(iii) and in IRC sections 674(c) and 672(c).

E. The "Critical Quartet"

While the four critical issues listed here are not the only issues in Step Two Design, they will be present in your planning so often and have such critical consequences if done incorrectly, I will group them together for the attorney or advisor to understand.

1. Qualified Appraisal by a Qualified Appraiser.

Reg. sec. 1.170A-16(d) requires that all non-cash gifts with a value of more than $5,000 must meet these three requirements to qualify for an income tax charitable deduction:

a. Substantiate the contribution under IRC section 170(f)(8) and Reg. sec.1.170A-13(f). However, Reg. sec. 170A-13(f)(13) exempts this provision for contributions to a CRT.

b. Obtain a qualified appraisal by a qualified appraiser as defined in Reg. sec. 1.170A-17(a) and (b)

c. File a Form 8283, Exhibit #5a with the Form 1040 on which the deduction is claimed.

Please refer to the Checklist for Qualified Appraisals attached to this outline as Exhibit #4. This is for your use with appraisers. Many appraisers who do not ordinarily work with charitable contributions do not understand that a "Certified Appraisal" as provided by state law licensing requirements is not a "Qualified Appraisal" for federal tax purposes. Everything in the Checklist must be included or the deduction may be denied. You may need to check off items in the checklist once you receive the appraisal of the funding asset to ensure the checklist was followed. Appraisals must be kept available for IRS review and for gifts of more than $500,000, the appraisal must be attached to the tax return on which the deduction is claimed. Reg. sec. 1.170A-16(e). Forms 8283 and 8282 also must be filed. Exhibits #5a and 5b.

2. Pre-arranged Sale

This issue, more correctly referred to as an "assignment of income", has been litigated by the IRS since the 1930's. In the charitable field, it is referred to a pre-arranged sale because its occurrence pops up when a donor seeks a buyer for his or her asset prior to making the gift. Generally, the asset is an appreciated asset with unrealized capital gain. A gift of such an asset to charity or a CRT will avoid the taxation on the gain on transfer provided that the donor did not take steps to sell it or locate a buyer who can compel the

completion of a sale. Almost a century of court cases define this issue. And the litigation on the matter does not appear to be going away! It is an important issue to understand when working with a client who intends to make a contribution of an appreciated asset.

The problem arises when the donor has gone too far in ”negotiating” a sale of the asset and thereafter transfers it to charity or to a CRT expecting to avoid the tax on the gain. This action taken by the donor ties the hands of the trustee, who then has no control over the sale. Numerous pre-arranged sale cases analyze whether the deal has essentially been “done” by the donor, whether or not legal title has actually shifted to the charity or the CRT.

If so, it is deemed that the charity or the trustee of the CRT is not the “seller”, and the donor is taxed on the pre-arranged sale’s gains while the proceeds of the actual sale after the contribution occurs are owned by the charity or the trust. The donor has no access to the proceeds from which to pay the tax. Basically, if it is the donor’s deal, it is the donor’s tax, and he or she cannot access the principal to pay that tax. It must come from other funds owned by the donor.

If that happens, your client will not be very happy. At the end of this outline you will find a short memo to give to donors that explains this problem as Exhibit # 6.. I have other materials that delve into the case law and go deeper into the rules and the cases that you can request.

3. Unrelated Business Income Tax

For many years, the rule for CRTs was that if the trust had unrelated business taxable income (UBTI), the trust was temporarily denied its tax exemption until the offending asset was disgorged. All the trust’s operations for that time period were subject to income tax.

Somewhere, someone thought that was not a good rule and a new system for taxation of CRT’s unrelated business income was invented. Even the national professional association for planned giving officers approved of the new system of taxation for CRTs. The problem is that this new system is worse! It applies a *confiscatory tax of 100% to any unrelated business taxable income.* In other words, if a CRT has <u>any</u> UBTI, “send it in”!

This has limited the CRT to passive investments and has caused issues with the transfer of business interests that will be sold by the CRT. See the Power Point presentation for a brief explanation of UBI, or unrelated business *income*, UBTI, or unrelated business *taxable income*, and UBIT, or unrelated business income *tax* (rates for corporations and trusts).

There are two forms of UBI, income from an operational trade or business and debt-financed income or "DFI". It is a complex set of rules in IRC sections 511 through 515 and the regulations thereunder.

4. The "infamous" and most frequently misunderstood 10% rule.

IRC 664(d)(1)(D) and (d)(2)(D) require that the actuarial value determined under IRC section 7520 (the "applicable federal rate" used in the determination of the value of either the remainder interest in the CRAT or the CRUT) be at least 10% of the net fair market value of all property placed in the trust—

> Initially for the CRAT and
>
> As of the date the property is placed in the trust for the CRUT(which makes the minimum 10% applicable to additional contributions as well)

Unfortunately, this 10% rule is often misunderstood to mean that the charity must receive 10% of what was transferred to the trust at the end of the trust term.

That is not correct at all. The charity must receive 100% of whatever "remains" or the remainder interest in the trust at the end of the trust term.

Where did this rule come from and why was it added to the rules for CRTs? Before the advent of this rule, too many abusive transactions were taking place where the CRT was simply used to wash all the capital gain by making the payout so long (by adding so many beneficiaries), or the payout rate so high, that the value of the remainder interest would be as little as 0.001% and the trust would still qualify as a CRT.

How could the IRS be assured that this trust would be used for charitable purposes? It is hard to determine a subjective "charitable intent". Instead, the IRS worked out a provision that was adopted by Congress, adding a quantitative test for "charitable intent" by requiring a 10% minimum deductibility rule.

However, that led to many potential donors believing that the rule provided for leaving 10% of the assets to charity. A very wrong interpretation. Basically, the rule is based on the current Applicable Federal Rate (IRC section 7520) at the time the gift is made (not later at the end of the trust term). It requires by actuarial calculation a determination that the present value of the charity's future interest must be at least 10% of the total amount transferred to the CRT.

To explain this requirement to most donors simply leaves them scratching their heads. The easiest way to inform them of the rule is to explain that all transfers of property to a CRT, whether the single transfer allowed for the CRAT or any transfers made to the CRUT, must have at the date of gift a current deduction allowable valued at a minimum

of 10% of the total gift value. Note that the rule does not describer the deduction as "allowed", but as "allowable" because there are other deduction rules and reduction of the deduction rules that may also apply to any income tax deduction for a charitable gift.

5. The CRAT Probability test. As a subset to the Critical Quartet 10% minimum deduction rule just above, the CRAT also has a 5% probability test, or a 10 % termination test because of its fixed payments. Fixed payments for the life of a donor may cause the trust to be exhausted before the end of the trust term.

Because so few CRTs are drafted as CRATs, I add this as an addendum to the Critical Quartet 10% rule. In the IRS Statistics of Income you will find that CRATs are rarely used in comparison to CRUTs. However, if you work with a CRAT you must be aware that in addition to the 10% rule, there is also a 5% probability test for lifetime (not term of years) CRATs in Rev. Rul 77-374 and an alternative "termination test" in Rev. Proc. 2016-42. Rev. Rul. 77-374 provides that if there is a 5% or greater chance that the CRAT principal will be exhausted before the end of the trust term (life or lives of individuals), the trust fails as a qualified CRT unless modified or reformed. Alternatively, the trust instrument may add a provision that if the corpus value is invaded for the fixed payments to the point that only 10% of the original value remains, the trust will terminate and distribute all its assets to the named charity or charities. The exact language is in the IRS sample forms.

IV. DRAFTING THE CRT

A. Using a Client Questionnaire

The Client Questionnaire included in the materials as Exhibit # 2 serves two purposes: first, it gathers most of the information you will need for drafting the trust, and second, reviewing it with the client provides important education for the client and allows him/her to create a trust that fits his or her needs. Using the questionnaire in discussions with the client will also help the client understand the trust language once the trust instrument is drafted.

The Client Questionnaire is included at the end of this outline in Word form so you may use it as is or modify it as you wish. We will go through it in the session so you understand it. When working through the questionnaire with a client possibly his or her advisor, or the nonprofit planned giving officer, this questionnaire takes about one hour to fully discuss the issues. With certain clients who are very inquisitive, it may take longer to complete the discussion.

With a completely filled out questionnaire, trust drafting will be much easier and consume less time.

B. The Subtraction Method of Creating CRT Templates for Your Office

The "subtraction method" presented in this session makes it easy for you to modify the trust to make your own templates. You can also use the trust presented here to glean additional materials and options if you are using Wealth Counsel and wish to modify the Wealth Counsel CRT form. I started with the FlipCRUT for two lives with two settlors. I have added many options within the form. See the attached FlipCRUT template at the end of this outline as Exhibit # 7.

By subtracting or removing provisions from the two-settlor, two-lives FlipCRUT, you can make all variations of a CRT: NIMCRUT, NICRUT, SCRUT and CRAT.

Article Two of the trust we will use in session provides the terms for distribution of the "income" interest. It includes all the provisions required for the FlipCRUT. We will analyze that, and then we will *remove* the terms for the Change of Method and the Triggering event, which leaves the terms required for a NIMCRUT.

Then, we will remove the Deficiency Amount and Deficiency Payable terms, leaving the terms required for a NICRUT.

Next, we will remove the terms required for the net income option, leaving just the required SCRUT fixed percentage terms.

Finally, we will remove the unitrust fixed percentage terms and leave only a fixed annuity provision to form a CRAT.

Each time we remove one of the provisions for one variation of CRT, there will be necessary changes to other parts of the trust that will be highlighted in the Power Points.

Please refer to the CRT trust template attached to this outline. We will work through the subtraction of terms in the session.

C. Schedule A as a Separate Document

With most revocable living trusts, you add a Schedule A or some type of schedule that lists the assets transferred to the trust. It is recommended that you alter the typical Schedule A or other schedule to add a very important feature for charitable contributions.

The trust signature page executed by the trustors and the trustee simply indicates agreement of the contractual terms of the trust. A tax deduction for a charitable gift must have a specific date on which the donor has fully relinquished dominion and control in order to ascertain the exact value of the charitable contribution as of that date. Schedule A can be used to do that by making it a memorialization of the date on which the title to the gift was given to and received by the trustee. By adding an acceptance of the gift by

the trustee which is signed and dated by the trustee, you have a record of the date of relinquishment of donor's dominion and control.

If the donor is also the trustee, it will be important for him or her to understand that the date of signature on the *trust instrument* in his or her individual capacity may be different than the date of his or her signature *as trustee* when the title was actually transferred to the CRT. Occasionally, and possibly more often that you might think, trustors sign the trust instrument, but do not transfer the asset(s) for days, weeks or months. It is helpful many years later to have a recordation on the Schedule of the actual date of transfer of assets into the trustee's name. It is often different than the date the trust instrument was signed.

D. The Package

Many attorneys simply draft a trust document and perhaps transfer the asset into the name of the trustee. Because the CRT will operate for many years and is irrevocable, you may assist your client with many more parts of the transaction by offering a package.

This package may include:

The trust
The EIN
A Certification of Trust
A template for the resignation of trustee and acceptance by a successor trustee
A template for the removal of a trustee and acceptance by a successor
A template for the appointment of an Independent Special Trustee where unmarketable assets are held in trust
A template letter for redesignation of charity(ies) where the donor retained that right
The Appraisal Checklist
The Pre-arranged Sale Memo

The four templates listed here are attached as Exhibit #8.

V. ISSUES IN TRANSFERRING ASSETS TO THE CRT

While attorneys deal with asset transfers to trusts on a regular basis, there are some specific issues that crop up in charitable transfers. In order to claim a deduction for federal tax purposes, the taxpayer must be able to show the he or she has parted with dominion and control of the asset. That can be problematic with certain types of assets.

A. Incomplete records. With closely held businesses the owners are often too busy to keep records current. Closely held corporations may not have regularly recorded transfers of stock or may not even have a ledger for stock issuance or transfers or stock certificates. The members of an LLC may not have an operating agreement (OA) written, or the OA did not

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take into consideration permitted transfers or may have a mandatory buy-sell that causes pre-arranged sale issues. An amendment to the documents may be needed, or a waiver of buy-sell provisions may be necessary.

B. Undisclosed entities. Donors sometimes have a tendency to give the attorney information on their asset holdings and forget to mention that actually the donor does not own the asset at all. Their LLC, their corporation, their spouse, or their living trust may own the asset or their brother-in-law may own half of it. The transfer of the asset to the CRT will require unwinding the real ownership to make sure the individual can claim a deduction, if that is what was intended. For example, and especially with a living trust, if the trustee intends to transfer its asset to a CRT, does the living trust trustee have such a power in the trust instrument? Most living trusts do not. The attorney transferring the asset to the CRT will either need to amend the trustee powers or add a provision allowing the settlor to make the transfer directly. Otherwise, the attorney can transfer the deed out to the individual's name and then into the CRT so the individual can claim the tax deduction.

C. Hidden pre-arranged sales. Partnerships, TICs, LLCs and corporate entities often have "built-in" buy-sell provisions. These generally mandate a sale to the other owners, or to the entity. That runs afoul of the pre-arranged sale rules. Be sure to check those documents, and in the process, especially review for a section on Permitted Transfers that may allow a transfer to a "living trust" for the benefit of the owner or member. If the CRT is a lifetime transfer and not a testamentary CRT, it is a "living trust" even though that is probably not what the drafting attorney intended. The Permitted Transfer provision may thus apply to the transfer of the asset to the CRT.

D. Cost of Sale; Costs of Investment. In making presentations to the client as to the payments from the CRT, the attorney should consider the effect of costs of sale. This is particularly true where real estate is transferred to the trust. The realtor's commission plus other costs of sale by the trustee will be paid out of the trust assets and will thus lower the assets that can be reinvested. For example, if a $1 million parcel of property has sale costs of 6%, the assets to be reinvested will be 94% of the gifted amount. However, the first year's payout of, let's say, 5%, will be based on the $1 million or $50,000. The 94%, or $940,000, will need to provide the $50,000 for the first year, or a real rate of return needed of $50,000/$940,000, being 5.3%. This must be taken into account from the beginning before the payout rate is determined and irrevocably written into the trust agreement. This reduction of value also affects the second and later years of a CRUT as the trustee attempts to invest to catch up to the expectation of the donor who was told he or she would receive $50,000 from this gift to a CRT. If in the second year (after possibly a short first taxable year) the trust is still below the $1million mark, that year's payout will be less than $50,000 as it will be based on the reduced value due to sale costs. This should be discussed in advance so the donor is not surprised and unhappy.

The attorney or the financial advisor must also take into account when setting the payout rate the other costs of the trust. For example, if the investment advisor tells the donor he/she

can invest this trust to earn 7%, what rate of payout is a good choice? 6%? You must consider the fees associated with operating the trust before answering the question of what is viable as a rate of return. If the investment manager charges 1% and the trustee charges 1%, or a trust administrator charges 33 or 50 basis points, can the trust still meet a 6% payout without needing to invade principal? That calculation needs to be done *prior* to setting the percent payout for the CRT. Invasion of principal creates a spiraling down of the value of a CRUT and thus a spiraling down of the "income" distribution. This creates another problem for the investment manager who may not be able to easily make up the results of lost value.

E. Carrying costs of certain assets. In the case of real estate, there will be carrying costs such as a prorated property tax, insurance, maintenance and possibly fix up prior to the CRT's sale of the asset. If the real estate is a personal residence, or if a rental with low net rental income, where will the trustee get the funding to pay these expenses? The donor may need to fund the trust with some amount of liquid assets at the commencement of the trust.

F. Title/no title. Some asset transfers may be ascertained by recordation of title, if available. But assets other than real estate may have no title. They may have a registration, the transfer of which to a new owner does not signify a transfer of "title" or "ownership". Cattle, vehicles, planes, art, and other assets. Some assets have neither recordation nor registration. Cryptocurrency held in cold storage, a Navajo blanket. A bill of sale or a Deed of Gift may have to be drafted to indicate ownership transfer to the trustee.

G. Debts, Liens, Encumbrances. These may cause debt-financed issues that bring into play either grantor trust rules disqualifying the CRT, or acquisition indebtedness that causes the 100% confiscatory tax rate. It is not solely mortgages that cause liens or encumbrances in these grantor trust or UBIT rules.

VI. OPERATION AND ADMINISTRATION

A. Operation.

The last of the Five Steps of planning happens after the gift is closed. There are many rules that still apply to keep the trust qualified. It is important to remember that the CRT must be both *organized* and *operated* in a manner to obtain and maintain qualification. Here are some of those rules.

1. Getting the EIN online. This is easy and routine. The grantor of the trust is supposed to file for the EIN. The trustee or the trust administrator may also get the EIN for the trust. Make sure to get the EIN Letter online or it will take 4-6 weeks (if you are lucky) to get the EIN letter and be able to open banking and investment accounts.

2. Banking and Investment Accounts. Make absolute certain that the bank or brokerage has and USES the EIN of the CRT. There have been instances where the donor used a brokerage for his or her personal accounts and then uses the same brokerage for the CRT. The

brokerage then attaches the donor's SSN to the CRT account. All CRT activities are then reported on the donor's 1040. The end result is that the IRS will assess all the earnings to the donor, and charge interest and penalties. In one case I took over for correction, the CPA did not even notice what the brokerage had done and filed the brokerage's 1099 for the activities of the CRT with the donor's Form 1040. After several years and penalty notices, it cost the donor tens of thousands of dollars in legal fees to rectify the situation with the IRS.

3. Four-tier system of classification of distributions for the beneficiary's K-1. Refer to the materials at the end of the outline for information on how this unusual system of characterizing the distribution on the K-1 for the CRT beneficiary works. Exhibits # 3a and 3b. It is complex and is one of the reasons the donor who serves as trustee without a trust administrator will most likely make a mess of the tax returns that will be hard to unwind and correct. I have had to correct several CRTs that had incorrect accounting and tax returns for years. Since this 4-tier system is rolled over from one year to the next, it can take months or years (and costs) to unravel it to get a good starting point for a new trustee or trust administrator to take over. A trustee or trust administrator has to have a correct starting point to accept a takeover.

4. Self-dealing. Refer to the self-dealing checklist in the Power Points and a memo at the end of the outline.

5. UBIT. Refer to the UBIT Power Points for the definitions and a brief application of these tax rules. It is a vast subject that applies not only to CRTs, but also to charities and qualified plans and IRAs.

6. Grantor Trust rules continue to apply. It is not only at the outset that the grantor trust rules apply. Breach of these rules at any time during the trust term will disqualify the trust. The trust will become a taxable grantor trust with the donor paying all the taxes but not having access to the trust funds. The trust will not be exempt and the deduction may be lost if within the statutory time frames for audit (three years or six years).

7. Remember for CRUTS of all four variations that additional contributions must run the 10% rule calculation before adding a contribution to the trust. If the addition runs afoul of the 10% test, that portion will be deemed allocated to a new, nonqualified segregated trust to preserve the original CRT's qualification.

8. Over and under valuations. If the trustee has undervalued the assets and has distributed the annuity or the unitrust amount based on that undervaluation, the trustee must pay out the corrected distributable amount upon such discovery. If the trustee has overvalued the assets, and overpaid the beneficiary, the beneficiary must pay back the excess distributions within a "reasonable time" (whatever that means as it is not defined) and you will have a very unhappy client.

9. Independent Special Trustee. Do not forget to have either an appraiser or an independent trustee determine the value of unmarketable assets held in trust at any point during the trust term.

10. Reformation. IRC section 2055(e)(3) provides a statutory reformation process for CRTs. Do not rely on modification rules in state law if it allows the donor to modify the trust (even if conditions in state law would apply) if that modification would be deemed to cause grantor trust status. That would disqualify the CRT as a grantor trust. See addendum to this outline for a flow chart to determine if the reformation will qualify.

11. Choosing a trust administrator. If your client prefers to serve as trustee, advise him or her to contact a trust administrator who specializes in CRT administration. For example, CRTPro.com or yellwostoneta.com. There are others online as well. The two mentioned here are wholly dedicated to charitable split interest trusts such as CRTs and CLTs.

B. Termination.

1. Regular termination. At the end of the trust term, whether for life, lives or term of years not to exceed twenty, the successor trustee must wind up the CRT and make sure the funds are being distributed to one or more qualified charities. It is not the duty of the successor trustee to determine if the receiving charity is respecting a stated restricted usage, but it is helpful for the successor trustee to notify and remind the charity of any restrictions.

2. Early terminations. There are many times when a donor no longer wants the CRT for many different reasons. Refer to the sample letter attached to this outline for a donor who has indicated that he or she would like to terminate the CRT early. Here are a few of the ways to terminate early:

a. Gift the income interest, valued as of the date of gift, to the charity(ies) named in or pursuant to the trust terms. A deduction may be able to be claimed for this gift. It may need a qualified appraisal.

b. Gift the income interest to a charity in exchange for a charitable gift annuity, immediate or deferred.

c. “Split and Quit” by determining the actuarial value of the life estate and the remainder interest where the beneficiary retains the life estate value/proceeds and the charity takes the then determined remainder value/interest. The life estate has zero basis under 1001(e) and the value of the life estate is subject to capital gains tax. This is expensive for the beneficiary but if the beneficiary has a dire financial need, this split works.

d. Undertake a charitable rollover to a new CRT. Please only do this with expert assistance, such as with CRT-experts.com.

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ADDENDUM
Reformation of CRT--Flow Chart:

A. Applicability: Is will executed or trust created after 12/31/78?
If no, old 2055(e)(3) applies. If yes, go on.

B. Threshold questions:

1. Is the difference between the actuarial value (as reformed) and the actuarial value (non-reformed) 5% or less?

If no, stop here, not reformable.

If yes, go on.

2. Charitable remainder trusts: Does the non-remainder interest terminateat the same times in both the reformed and non-reformed versions?

If no, see if it can be equalized.

If yes, go on.

(Special rule — Term CRTs over 20 years can be reformed down to 20 years and still meet this requirement.)

3. Charitable lead trusts: Are the non-reformed and reformed charitableinterests for the same period of time in each version?

If no, see if it can be made equivalent, if not, no reformation possible.

If yes, go on.

4. Is the change effective as of the date of decedent's death?

If no, not reformable (in future drafting, make it refer back to decedent's death)

If yes, go on

C. Is the charitable interest reformable?

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1. Does the gift go to a qualified charity, but just misses the technicalrules?

If no, cannot be reformed

If yes, go on

2. Before the remainder vests, are all payments stated either in specifieddollar amounts or in fixed percentage of the FMV of assets? (See664(d)(3))

If no, go on to C.3.
If yes, go on to D.

3. If no in C.2., has a judicial proceeding been commenced by:

- 90th day after 706 filing (including extensions)?

or, if applicable

- 90th day after trust's first-year 1041 is filed (including extensions)?

If no, no reformation possible.

If yes, go to D.

D. Reformation: What qualifies as a "reformation"?

1. Amendment signed by parties if state law accepts it as binding

2. Construction (court interpretation and reconstruction of document)

3. Reformation proceedings (petition to court based on mistake of fact or law in the drafting)

4. Otherwise (whatever might be binding under state law)

E. Scrivener's Error

Check IRS private letter rulings on CRTs. There are several rulings allowing corrections for "scrivener's error", however, the drafter has to admit he/she made the error.

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TOP TEN TIPS ON CHARITABLE REMAINDER TRUSTS

1. What is a Charitable Remainder Trust?



Most families do not have a trust and if they do, it is a "Living Trust". A Living Trust is revocable and avoids probate while setting out a plan for the parent or parents and then for children and/or grandchildren.

The parties to a trust are:

- ✓ the persons who set it up, the "settlors"
- ✓ the person(s) who manages the trust, the "trustee"
- ✓ the persons who benefit from this arrangement, the "beneficiaries"

All trusts split the use of the trust between the "income beneficiaries" and the "remainder beneficiaries". In other words, the first set of beneficiaries gets to use the trust property or use the income from the trust property.

The second set of beneficiaries then later gets "that which remains in the trust" otherwise known as the "remainder interest".

In family estate planning, the income beneficiaries generally also have access to the principal, or the trust property.

2. How is a Charitable Remainder Trust different?

A Charitable Remainder Trust (the CRT) is an irrevocable trust with special federal income tax rules it must meet in order to achieve the tax benefits listed below.



The Settlor creates the trust by having a trust drafted by a qualified attorney who understands the federal rules for CRTs and transferring assets or cash to the Trustee to manage.

The Settlor names the beneficiaries—

- ✓ the "income" beneficiary, one or more living persons, and
- ✓ one or more charities to receive the "remainder interest" when that person or those persons decease.

The time period for the income beneficiary to receive the trust income can also be for a set number of years, up to 20 years, instead of for their lives. Most CRTs, however, are set up for the income beneficiaries' lives.

The Settlor also names the Trustee to manage the trust assets. The Settlor can name himself or herself to serve as Trustee, but it is strongly advised that he or she work with a knowledgeable CRT trust administrator due to some complex federal tax rules and tax accounting requirements.

3. How much income can the income beneficiary receive?



"Income" from a CRT is based on the value of the assets held by the trust instead of what those assets earn. The amount that is paid to the income beneficiary is stated by a percentage. For example, 5% times the asset value of the trust assets each year (unitrust version) or 5% times the initial asset value of the trust assets (annuity trust version). Almost 90% of all CRTs that are created are in the form of a unitrust, which will be explained below.

The federal rules require a minimum payout rate of 5% and a maximum payout of 50%. Almost all CRTs pay out between 5% and 8% yearly because of the long term of the trust (lives of individuals). Higher percentage payouts often destroy the trust due to the need to eat into principal to meet the mandatory trust payout.

4. What happens when the income payments cease?



When the income beneficiary deceases or the term period set by the Settlor expires, the remainder beneficiary then receives the assets of the trust outright and free of trust in almost all cases (which depends on how the Settlor drafted the trust instrument).

The remainder beneficiary, also called the remainderman, must be a qualified charity under federal tax rules. Hence the name "Charitable Remainder Trust"—the remainder beneficiary must go 100% to the qualified charity or charities.

The Settlor names the charity or charities to receive the trust assets. The Settlor can reserve the right to re-designate the named charity later, as long as the trust irrevocably requires that the remainder assets be distributed to qualified charities.

In fact, the Settlor can delay the naming of the charities at all until a later time, but if the Settlor does not complete the naming of charities before the end of the income interest term, then the Trustee must distribute to qualified charities in the Trustee's discretion. That is a definite rule and an irrevocable transfer to charity of 100% of the assets.

5. Why use a Charitable Remainder Trust?

The easy way to understand and remember the benefits of the CRT is this:



This is a great **"IDEA"** which is **"IDEAL"** for you

I = Income

The CRT pays income for life or for a set term of years as in the Settlor's choice. Depending on the asset originally transferred to the trust, this income may be much more than what the Settlor was receiving. For example, if the Settlor transferred his or her residence, that residence was not producing income. But the Trustee would sell the house and the re-invested funds would now generate a nice income flow.

D = Deductions

A portion of the value of the transferred asset will give rise to an income tax charitable deduction on the Settlor's Form 1040. The amount that is deductible is based on the ages of the Settlor (how much longer the charity must wait for its share), the percent payout the Settlor sets, and how may

beneficiaries the Settlor names. Some other factors also apply to create the actuarial value setting the charitable deductibility.

E = Escape estate tax where applicable and use an Exempt trust

If the Settlor's estate is subject to estate tax, the amount left to charity will be a charitable deduction to the estate. Plus, this CRT is also exempt from income tax during its operation, thus allowing the trustee to buy and sell without paying tax. Once the income beneficiaries receive income, they pay tax on their trust income though.

A = Avoid capital gain

The transfer of an asset that has appreciated can be transferred to the CRT without paying capital gain on that transfer, so the full value of the asset can be reinvested for the benefit of the income beneficiaries.

Why is this Ideal?

It is largely tax-financed! No gain tax, an exempt trust, (just as exempt as an IRA or qualified plan), deductibility against income tax, deductibility against estate tax where applicable.

It also allows a person to become a Philanthropist while living on the income from the assets.

6. What assets work with a CRT?



Surprisingly, most assets generally held by an individual or family will work with a CRT. Appreciated property where there is inherent untaxed gain is especially good to use.

- → Publicly traded stock
- → Closely held stock
- → LLC memberships/Limited Partnership interests
- → Residential real estate
- → Multi-family real estate
- → Agricultural property
- → Retail/Strip malls
- → Natural resources
- → Qualified plans
- → Collections
- → Cryptocurrency

Depreciated property may cause some of the deductibility to be reduced but can still be used.

Stocks, bonds, real estate, intangibles, tangibles. They all have some specific rules that your CPA or other financial advisor will discuss with you to assure that the asset is a good fit with a CRT.

7. What assets might not work with a CRT?



Those assets causing taxable income can be a problem—unrelated business taxable income causes a confiscatory at a 100% tax rate. Operating businesses held as a sole proprietor or an LLC taxed as a partnership may cause a problem and must be discussed with your advisor.

Mortgaged property must be carefully structured to avoid issues.

Pre-arranged sales (where the Settlor has already negotiated a sale prior to transferring the asset to the CRT) may cause the untaxed capital gain to be taxed

to the Settlor *after* the asset is transferred to the CRT, causing a tax bill to the Settlor without the means to pay the tax.

S Corporation stock cannot be held by a CRT without the company losing its S election.

8. Who manages the trust?



The Trustee named by the Settlor manages the trust and its operations.

Selection of trustee can be from these three groups:

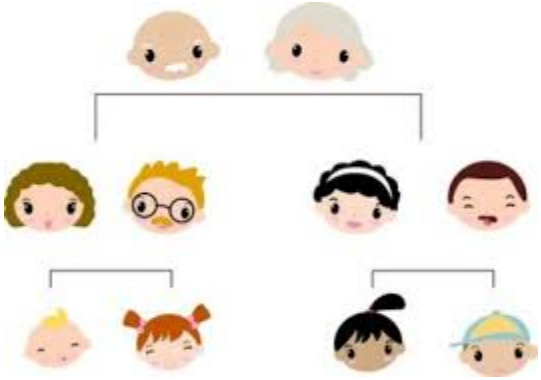
- ✓ Individuals—trustor, family, friends, professional individual fiduciaries
- ✓ Commercial trustees—banks and trust companies
- ✓ Nonprofit charities—most likely one named as remainder beneficiary

Where an individual is named, it is wise to engage a trust administrator

Your CPA may have the capacity to assist but may have a conflict is serving as trustee.

Accountings, valuations and accuracy of payments are very important, so a wise choice of trustee is very important.

9. What about the heirs?



Families often ask how to benefit children when the assets of the CRT must go to the charity at the end of the trust term.

Consider this:

- ✓ Using a term of years extension after the parents' lifetimes, for a fixed number of years not exceeding 20 for the children.
- ✓ Or, using Wealth Replacement Life Insurance Trust

10. How is an investment policy and program for your CRT set up?

To make sure the CRT operates efficiently for the long term, it is wise to create a written statement of investment policy with your investment advisor to meet the Settlors' needs.

Adherence to the plan, monitoring and rebalancing should be addressed on a regular basis with your investment manager, CPA or other financial advisor.

These are the keys to your successful use of a CRT!



Lynda L. Sands, JD/MBA

Innovative Solutions in Philanthropy
www.lyndasands.com

CHARITABLE REMAINDER TRUST QUESTIONNAIRE

Please input your answers right on this questionnaire and scan/email (LS@lyndasands.com) or fax it back to me (858-345-3339). Not all questions will apply to the trust you choose, so please do not be concerned at the length of this questionnaire. This trust is irrevocable, so it is important that you consider all aspects of it. We will go over these answers on the phone/Zoom and address any questions you may have. There will no doubt be questions you may not know how to answer. That is why we will spend considerable time thinking through all the replies. Don't worry about leaving questions blank. They are there to promote a discussion that leads to a successful trust design for you.

Thanks.

CHARITABLE REMAINDER TRUST IN GENERAL

This trust has been in the Internal Revenue Code since 1969. While it has had some revisions, it is essentially unchanged. The trust "splits" the interests in the asset(s) you contribute; (1) First there is an "income interest" paid to you or another individual (and in some cases to an entity), and (2) whatever remains in the trust after the income interest has expired (whether it lasts for one more lives or for a term of years not to exceed 20 years), that which remains in the trust is irrevocably dedicated to one or more charities, hence the name charitable "remainder" trust. What the charity receives is called "the remainder interest".

You can think of this split as the fruit (the income produced) and the tree (the assets ultimately going to charity that produced the fruit for you during the trust term).

CHOOSING YOUR TYPE OF CHARITABLE REMAINDER TRUST

☐ ANNUITY TRUST

Referred to as a CRAT (Charitable Remainder Annuity Trust), this trust pays a fixed dollar amount based on a percent you set in the trust instrument times the initial value of money OR assets transferred to the trust. You can make only one contribution. The annuity amount never changes, even though the trust asset value may increase or decrease.

UNITRUST — 4 VARIATIONS

☐ STANDARD VERSION (SCRUT)

Referred to as a CRUT (Charitable Remainder Unitrust) or SCRUT (Standard Charitable Unitrust).This trust pays a fixed percentage times the yearly trust asset value, valued as of the first business day of the year. Therefore, the payout fluctuates with the asset values each year, but the distributions as determined at the beginning of each year are mandatory payments. Additional contributions are allowed.

☐ NET INCOME WITHOUT DEFICIENCY MAKE-UP

Referred to as a NICRUT, this trust pays the smaller of two amounts—the percentage you set in the trust document or the actual net income of the trust ("income" may be drafted to be only "ordinary income", such as dividends, interest, rents, royalties, annuities, or also to include realized net capital gains). If this trust pays less than the percentage stated in the trust, the trust does not pay back any prior year's deficiencies. Not many people choose this option as they prefer the NIMCRUT.

☐ NET INCOME UNITRUST WITH DEFICIENCY MAKE-UP

Referred to as a NIMCRUT, this trust is like the one just above with a major exception. The trust pays the smaller of two amounts—the percentage you set in the trust document or the actual net income of the trust ("income" may be drafted to be only "ordinary income", dividends, interest, rents, royalties, annuities, or also to include realized net capital gains). In years when the trust pays less than the percentage you set in the trust document, a "deficiency" is written in the books of account. If in later years the trust earns *more* than the percentage you set in the document, the trustee must pay back any deficiency up to the amount of earnings in that later year in excess of the fixed percentage amount. Thus, prior years' deficiencies may be able to be distributed with later years' excess earnings.

☐ FLIP UNITRUST OR FLIPCRUT (IRS NAME FOR IT IS CHANGE OF METHODS UNITRUST)

Referred to as a FlipCRUT, this trust starts out in its first phase as a net income with deficiency make-up NIMCRUT or as a NICRUT, and often holds illiquid assets such as real estate before the trustee sells the asset(s). Once the funding assets are sold or another stated "triggering event" happens, the trust moves into its second phase as an SCRUT with mandatory yearly payments based on the percentage set in the document and the yearly value of the assets.

The second phase (the "Change of Methods") starts on January 1 the year following the triggering event (such as the sale of the illiquid assets). Other events can be the trigger for changing from a NIMCRUT to an SCRUT, such as a pre-set retirement age written into the document, a birthday date in the future, or a child or grandchild reaching a certain age, a marriage, a death, and other specific events. However, any event used as the triggering event must be beyond the control of the grantor or the trustee.

Describe Triggering Event for FlipCRUT here:

_____

_____

MOTIVATION QUESTION

So we better understand how to set up your trust and whether you have chosen the best type of trust on this questionnaire, please tell us a little about why you are interested in a charitable remainder trust.

First, we think it's a great ***IDEA.***

I — It provides an income stream for your life or for other individuals. It may also best set <u>for up to 20 years</u> instead of lives of individuals. The type trust you choose will determine how, and how much, income is paid to you.

D — Deductions are available for the value of the remainder interest you have ultimately committed to charity. There are two types of deductions to understand.

1. **<u>Income Tax Charitable Deduction</u>**
   This deduction is available only for the value of the remainder interest to charity (not the entire value because you are retaining a valuable portion — the income interest). When you setup the trust and transfer assets to it, an actuarial value calculator determines <u>as of that moment</u> the value of the portion of the trust dedicated to charity. This must be <u>at date of contribution</u> 10% of the total asset value.

2. **<u>Wealth Transfer Tax Deduction</u>**
   Wealth transfer taxes are estate & gift taxes as well as generation-skipping tax if you include grandchildren or later generations. You may or may not be subject to these taxes depending upon the level of exemption in effect at any given time and the level of your wealth.

E — Exemptions from tax, something everyone likes. A charitable remainder trust is exempt from paying income tax (unless it operates a business or has indebted property causing unrelated business taxable income taxed at 100%!) So, your CRT can invest similarly to your IRA or a qualified plan.

A — Avoidance of capital gains tax upon transfer of appreciated property into the trust. There are some exceptions, such as if you put your asset up for sale before putting it in the trust. Your trustee must arrange the sale out of the trust, not you, and the trustee receives the net proceeds after expenses of sale.

We think this is a "great IDEA" — in fact, it is IDEAL because it is;

L — Largely tax-financed through these tax benefits.

Now let us know what motivated you to consider a charitable remainder trust. It will help us draft the trust to fit your needs.

Here's the process we will go through from start to finish:

1. Understand your motivation and goals
2. Design a structure that works for you and meets your goals
3. Draft the document to accurately reflect the structured designed for you, and review it with you
4. Transfer the assets or see to it that such transfer is done
5. Set up operations and administration of the trust

This questionnaire:

This will be our guide to the process as we work together. Please answer the following questions as best you can, and do not be concerned about those you may not be able to answer just yet.

We will be spending considerable time together on these questions and any issues that may arise. We are committed to educating you on this type of trust so you know exactly what to expect. We want to make sure you understand the trust and its operations as well as how the assets you will transfer work with the trust. The trust is irrevocable and long-term.

To Start : WHO IS CREATING THIS TRUST?

TRUSTOR(S) (ALSO CALLED SETTLOR(S))

1. What is/are your legal name(s), first, middle and last, as you use them in legal documents:

   ☐ First _____
   ☐ Middle name _____, or
   ☐ Middle initial _____
   ☐ No middle name or initial
   ☐ Last _____

2. ☐ First _____
   ☐ Middle name _____, or
   ☐ Middle initial _____
   ☐ No middle name or initial
   ☐ Last _____

Your Address:

_____

_____

_____

Phone: _____

Phone: _____

Email: _____

Email: _____

TRUSTEE

2. Who will act as INITIAL trustee?

☐ Sole Settlor
☐ Settlors jointly
☐ Only one of two joint Settlors--please specify which: _____
☐ Corporate trustee--please specify and give name and title of authorized signer:

_____

_____

☐ Other trustee or co-trustees--please specify: _____

_____

☐ Nonprofit--please specify and give name and title of authorized signer or officer:_____

_____

TRUST NAME

3. What would you like to name the trust for legal purposes. See these examples--

☐ [LAST NAME ONLY] Charitable Remainder Unitrust: For example, Smith Charitable Remainder Trust, or Smith Charitable Remainder Unitrust.

☐ [FIRST NAME AND THE LAST NAME] Charitable Remainder Trust: e.g., John Smith Charitable Remainder Trust, or John Smith Charitable Remainder Unitrust.

☐ [FIRST AND LAST NAMES OF **EACH** OF TWO DONORS] e.g., John Smith and Mary Smith Charitable Remainder Unitrust or John Smith and Mary Smith Charitable Remainder Trust

☐ [FIRST NAME OF EACH AND THE LAST NAME **ONLY ONCE**]: E.G. John and Mary Smith Charitable Remainder Unitrust or John and Mary Smith Charitable Remainder Trust

☐ Other—such as not using family names, invent a name--please specify:

_____

PROPERTY

4. What type of property will you transfer to the trust to start it, (or later additions if a unitrust)?

☐ Closely-held stock
☐ Publicly-traded stock
☐ Real estate
☐ LLCs
☐ Partnerships--Limited
☐ Partnerships--General
☐ Annuity contracts
☐ Life insurance
☐ Depreciating assets (such as natural resources)
☐ Cryptocurrency
☐ Tangible personal property, such as art, precious metals, boats, planes. timber, cattle, etc.
☐ Other--please specify: _____

5. Who currently owns the property?

☐ Sole settlor
☐ Husband only
☐ Wife only
☐ Both H and W jointly as tenants in common
☐ Both H and W as joint and survivors with right of survivorship
☐ Both H and W jointly as tenancy by the entirety
☐ Both H and W jointly as community property
☐ Two other persons: Names_____
_____

☐ Legal entity:

- ☐ Corporation name_____
- ☐ Partnership name_____
- ☐ LLC name_____
- ☐ Trust name_____

6. Cost Basis of the Property _____

Acquisition Date of Property _____

Approximate Fair Market Value _____

BENEFICIARIES TO WHOM INCOME PAYMENTS WILL BE MADE?

7. Who will be the beneficiaries for the current payout from the unitrust or annuity trust (the "income interest")?

- ☐ The Settlor(s) of the trust
- ☐ Another individual or individuals
- ☐ A legal entity
  - ☐ Corporation,
  - ☐ Partnership
  - ☐ LLC
  - ☐ Trust
  - ☐ Estate
  - ☐ Other--please specify_____

8. If the beneficiary(ies) are individuals, will you retain the right to revoke your successor beneficiary's interest in the trust (this can only be done by your will) (Revocation in this manner will defer gift tax but will bring the trust value back into your gross estate for estate tax purposes.)

- ☐ Yes
- ☐ No

9. What percent will the trust pay out to the income beneficiaries?

- ☐ 5%
- ☐ 6%
- ☐ 7%
- ☐ 8%
- ☐ Other--please specify: _____
- ☐ The maximum to meet the required minimum 10% charitable deduction rule.

HOW LONG WILL THE PAYOUT TO THE INCOME BENEFICIARY(IES) LAST?

Select **one** of the following 3 choices in **one of these sections--10A, 10B, or 10C.**

10A. ☐ **LIFETIME PAYMENTS**

To one or more named individual beneficiary(ies) (such as husband and wife)

List name(s) _____

_____

List birthdates (required for calculation)

_____

_____

Choose One—

☐ Pay to multiple beneficiaries jointly (one check)? Equal shares?
Separate payments in different amounts? State percentages: _____

☐ Or to one beneficiary for life first, followed by the other for life?

After these lifetime beneficiaries, are there others? For example, to husband and wife for life and then the survivor of them, and then to children for their lives.
If so, please list:

List name(s) _____

_____

_____

List all birthdates (required for calculation)

_____

_____

_____

_____

IF YOU SELECTED LIFETIME PAYMENTS AND FILLED OUT 10A, SKIP NOW TO #11

10B. ☐ **A SET TERM OF YEARS PAYMENTS**

For a specified term of years, not to exceed 20 (must be used for legal entities, and may be used for individuals)? If so, how many years from 1-20? _____

List name(s) _____

_____

_____

List birthdates (required for calculation)

_____

_____

_____

Choose One—

☐ Pay to multiple beneficiaries jointly (one check)? Equal shares? Separate shares? State percentages: _____

☐ Or to one beneficiary first, and if that person predeceases the term of years the trust, then followed by the other or others?

What if all named beneficiaries die/dissolve (if an entity) before the term of years expires?

☐ To charity

☐ To the estate of one or more of the beneficiaries?

☐ Other thoughts? _____

IF YOU SELECTED A SET TERM OF YEARS AND FILLED OUT 10B, NOW SKIP TO #11

10C. ☐ COMBINATION OF 10A AND 10B--LIFETIME PAYMENTS FIRST, FOLLOWED BY A TERM OF YEARS FOR OTHER BENEFICIARIES

Payments for life or lives of individuals (such as Mom and Dad, followed by term of years for other individuals (such as children):

List legal names of **life beneficiaries**

_____

_____

Choose One—

☐ Pay to multiple beneficiaries jointly (one check)? Equal shares? Separate payments in different amounts? State percentages: _____

☐ Or to one beneficiary for life first, followed by the other for life?

Then list **term of years successor beneficiaries' names:**

_____

_____

_____

Choose One—

☐ Pay to multiple beneficiaries jointly (one check)? Equal shares? Separate payments in different amounts? State percentages: _____

☐ Or to one beneficiary for life first, followed by the other for life?

What if all named successor beneficiaries die/dissolve (if an entity) before the term of years expires?

If an entity, it will go to the charitable remainderman

If individual beneficiaries, to the estate of one or more of them? _____

Other thoughts? _____

List the birthdates of the beneficiaries, even though the second part of the trust is for a term of years. It is needed for the calculation.

_____

_____

_____

TERMINATION OF THE PAYMENTS TO BENEFICIARIES

11. Payments are most commonly made at the end of the period. Will the payout be

- ☐ Monthly
- ☐ Quarterly
- ☐ Semi-annually

☐ Annually

Quarterly is most common.

CHARITIES TO BE NAMED

12. Will charities be named in the trust, or will they be designated in a later document?

☐ Named now

☐ Names of charities left open for now and will be named later by additional document or Will.

13. If named now, what charities will be named?

Charity name	Share	Can charity be changed/removed?
_____	_____%	☐ Yes ☐ No
_____	_____%	☐ Yes ☐ No
_____	_____%	☐ Yes ☐ No
_____	_____%	☐ Yes ☐ No
_____	_____%	☐ Yes ☐ No

14. If the charity can be changed, by whom?

☐ Settlor
☐ Each settlor as to his/her gift to the trust
☐ Surviving settlor of two Settlors
☐ Trustee and Successor Trustee
☐ Income beneficiary (please specify name if other than settlor of trust)
_____

15. If a charity is removed, or if a charity is to be named later, who has the right to do so?

- ☐ Settlor
- ☐ Each settlor as to his/her gift to the trust
- ☐ Surviving settlor
- ☐ Trustee
- ☐ Income beneficiary (please specify name if other than settlor of trust)

_____

16. Alternate charities are required if one or more named charities fail(s) to qualify or ceases to exist. Do you have a preference as to who chooses an alternate?

- ☐ Settlor provides secondary charity choices. Please name charity(ies).

_____

_____

- ☐ Trustee names alternate charity or charities
- ☐ Trustee names alternates by class or purpose similar to failed ones, not by specific charity (Specify class or purpose of charitable cause):_____
- ☐ Remaining named charities that do qualify should share in the defaulted share in the same proportions as written in the trust
- ☐ Other charities--please specify names and percentages:

_____ _____%

_____ _____%

Ultimately it is required that the trustee names a charity if no selected charity qualifies.

17. Will a private foundation possibly be named?

- ☐ Yes
- ☐ **NO—SKIP TO NUMBER 18**

If yes, will it be one created by you?

- ☐ Yes

☐ No

If the foundation is to be created later, such as a year or more, would you like to form a testamentary trust or sub-trust within this charitable remainder trust to receive the charitable assets at the end of the charitable remainder trust term in case your foundation was not created or has not received its exemption by the time the CRT remainder interest distributes? (A second trust will require a second fee and a separate questionnaire. It may also reduce your charitable deduction.)

☐ Yes
☐ No

18. Use of trust assets by charity(ies)

☐ Unrestricted, general purposes—**SKIP TO #19**

☐ Restricted

Special purpose: Please describe_____

_____

Endowment: Name of fund_____

Is there an endowment agreement on file with the charity? If yes, please specify name of agreement and date of execution.

Name of Fund_____

Date executed_____

Donor Advised Fund: Name of DAF: _____

Is there a Donor Advised Fund agreement on file with the charity? If yes, please specify name of agreement and date of execution.

Name of DAF_____

Date executed_____

19. Early Distribution to Charity. Should the trustee have the right to make distributions to charity during the term of the trust?

☐ Yes
☐ No

If yes, is there a set standard by which the trustee should make the decision to distribute and how much to distribute? (Such as, only Settlor acting as trustee may make early distributions). Please describe:

_____

_____

20. Should the Recipient's payments terminate and be distributed to charity at:

☐ Date of death (prorated and any income paid to your estate)
☐ Last regular payment date (such as quarterly) prior to death (remaining stub of unpaid income after date of trust termination is paid to the named charity or charities)

TRUSTEE PROVISIONS

21. If co-trustees serve, should they

☐ Act jointly, **OR**
☐ One can act independently for the trust

If more than 2 Trustees
☐ Unanimously, **OR**
☐ By majority vote

Can multiple trustees divide their duties by written agreement?
☐ Yes
☐ No

22. Who should act as **SUCCESSOR** Trustee?

☐ Remaining co-trustee, if co-trustees were serving

☐ A named SOLE individual trustee--please specify:

First Successor: _____

Name: _____
City: _____
State: _____
Relationship to you_____

Second Successor: _____

Name: _____
City: _____
State: _____
Relationship to you_____

☐ Newly named set of CO-TRUSTEES--please specify:

Name: _____
City: _____
State: _____

Name: _____
City: _____
State: _____

Name: _____
City: _____
State: _____

☐ Does anyone have the right to name other trustees? If yes, who can appoint the SUCCESSOR trustee(s)?

_____

23. Can an institutional trustee be named? If yes, by whom?_____

24. Who can REMOVE and replace the trustee?_____

25. If settlor(s) is/are trustee(s), and illiquid assets fund the trust, who might serve as Independent Special Trustee for valuation? (We will discuss this together)

_____

TRUSTEE POWERS

26. Will the trustee invest in any of the following assets--check which ones

- ☐ Closely-held stock
- ☐ Publicly-traded stock
- ☐ Real estate
- ☐ LLCs
- ☐ Partnerships--Limited
- ☐ Partnerships—General (caution!)
- ☐ Annuity contracts
- ☐ Life insurance
- ☐ Depreciating assets (such as natural resources)
- ☐ Cryptocurrency
- ☐ Other_____

27. Will the trustee be able to

- ☐ Do short sales of stock
- ☐ Make loans or extend credit (such as taking back a note for a sale of real estate)

TRUSTEE FEES

28. Will fees be paid

--To the **Initial** trustee(s)?

If yes, how much? Check one: Fixed amount _____Fixed percent_____
Reasonable fees_____Other_____

--To a **Successor** trustee?

If yes, how much? Check one: Fixed amount _____Fixed percent_____
Reasonable fees_____ Other_____

--**No fees** to trustees? Confirm here☐

CONCLUDING PROVISIONS

29. Should the income beneficiaries' interests be assignable to others?

☐ Yes--freely transferable, you can gift early to charity or gift or sell to another trust, terminate trust, etc.
☐ No—income beneficiary cannot gift to another trust, sell to a third party or transfer the income interest to charity

30. What state law should govern the trust?

☐ State of Settlor(s) residence listed above
☐ Movable to new state where beneficiaries are then living and resident
☐ State of trustee's location: _____
☐ Other--please specify:_____

OTHER QUESTIONS ABOUT ASSETS CONTRIBUTED

31. Is the property you will contribute currently for sale on any listing?

☐ Yes
☐ No

32. Is there debt on property?

☐ Yes
☐ No

33. Is this asset used in business?

☐ Yes
☐ No

34. If it is cryptocurrency:

Is it on an exchange?

☐ Yes, what exchange(s)_____

_____

☐ No

Is it held in a brokerage account?

☐ Yes -If yes, what brokerage?

_____

☐ No

Is it held privately in a "wallet"?

☐ Yes

Hardware wallet? If so, in whose name?_____

Hot or cold storage? _____

☐ No. Explain how it is currently held_____

This relates to the type of transfer document we must use.

What type of crypto? (coins, tokens, NFTs, DAOs, other)

_____

_____

We will discuss more about the value, type and number of coins, etc.

35. If real estate, include **a copy of deed as filed** on the last transfer to you.

Location: _____

36. If intangible property (such as goodwill, copyrights, etc.), please describe:

_____

37. If tangible personal property, please describe:

_____
(Art, collections, classic cars, precious metals, etc.)

38. Generally, we make the transfer of the asset into the name of the trustee. If you prefer that we not make the transfer, who will transfer the asset to the CRT trustee?

_____

39. Will we apply for EIN (Tax ID number for the trust)?

☐ Yes
☐ No –Who will apply? _____

40. If an attorney representing the charity (and not the donor(s)) prepares the trust document, will we, as attorneys for you only review the charity's trust document?

☐ Yes
☐ No

41. Is there any other information we should have?

List here: _____

42. Is there another professional advisor advising the donor(s)?

List name, email and phone here: _____

****

We look forward to talking to you about this soon.

Email to lyndasands@me.com

Lynda L. Sands (formerly Moerschbaecher)
Phone 541-527-4265
Cell 858-414-0800
Fax 858-345-3339
Lyndasands@me.com

VERSION 2024-1

www.lyndasands.com

Trust Administrator for Donor-Trusteed or NonProfit-Trusteed CRTs;

CRTPro, Inc.
803 San Bruno Ave
Henderson NV 89002
800-422-3316
service@crtpro.com

Contact: Jeff Drollinger

The Trust administrator will work with your CPA if you have one, otherwise they will also prepare the yearly tax return.

The Four-tier System

In Reg. Sec. 1.664-1(d) a whole system of categorizing receipts and expenses of the CRT is laid out. There are four "categories" in which to post receipts and expenses. The planned giving industry calls these "four tiers" because they are like layers.

Receipts

The first tier is ordinary income, the highest tax rate (generally); the second is capital gain, both short and long term; then the third is called "other income" and in the current law, it contains exempt income, such as municipal bond income; and finally, the fourth tier is corpus, or principal.

The purpose of this system in a tax-exempt trust is to characterize the net income that will be distributed to the recipients, to be reported on a K-1 and to be included on the recipient's income tax return.

An additional point to understand is that the balance in each of the tiers is cumulative for the life of the trust. In other words, if there is more ordinary income than is required to be distributed in any given year to the recipient, the excess remains on the books for the purpose of characterizing later years' distributions. It is important to remember that the amount of actual money distribution is determined by the form of trust, annuity, or unitrust, and if unitrust, by the the form of unitrust. The character of that money distribution in the hands of the beneficiary is then determined by this four-tier system of allocation of receipts and expenses.

Unfortunately, the four-tier system is not always in sync with state laws of principal and income. Under state law, there are basically two categories—income and principal. In more recent years (since the 1997 Uniform Principal and Income Act), adjustments are allowed to re-categorize some receipts as between income and principal in order to achieve fairness and equity between the income beneficiaries and the remaindermen in a trust. Capital gains, for example, are generally allocated to principal under state law, even though they are taxed at the federal level as if an item of income. Special rates may apply at the federal level.

Expenses

The categorization of expenses under the four-tier system are even more distant from the concepts under state law. The rules are quite specific in Reg. Sec. 1.664-1(d). Within the "category" are "classes of income." For example, in the first tier, you might have stocks, bonds, royalties, rents, annuities, etc (ordinary income items) Each of those is a class. Expenses must be allocated first to each class of income within the tier if the expenses are directly connected to the production of that income. If an item of expense within the tier does not directly relate to the production of a class of income, then, after the directly

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connected allocations, the expense is allocated generally to the remaining income in the tier.

For example, if stock produces dividend income within tier one, and there is an item of expense directly related to it, that expense offsets the dividend income. If there is an item of expense that does not specifically relate to a class, but is attributable to the production of tier one income, it will offset the *net income* of tier one once the net income of each class is specifically determined.

Let's assume the trust has tier one gross income of $110,000. The expenses are only directly allocable to stocks and rents. Other expenses are not capable of being allocated to a specific class, but they do relate to the production of income.

	Stocks	Bonds	Rental income
Income	$40,000	$20,000	$50,000
Expenses	3,000	-0-	20,000
Net income	$37,000	$20,000	$30,000

Total net income = $87,000

Other tier one expenses = $ 5,000

Tier one net income = $82,000

This is done for each tier of receipts. This will also be important for determination of net investment income (NII) for the 3.8% surtax in IRS section 1411-3(c)(2)(i). (Affordable Care Act).

There are certain expenses that are allocated by the regulations, such as income and chapter 42 excise taxes, which must be allocated to corpus.

Distribution and Characterization

Once the net income from all tiers is determined, the accounts are ready to be considered in relation to the actual dollar amount that must be distributed. The dollar amount needed to be distributed in accordance with the type of CRT can be thought of as a bucket. If the CRT must distribute $100,000, and in the above example there was no income in tier two or three, there is only $82,000 of distributable income. Where will the balance come from to fill the $100,000 bucket?

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That depends on the form of trust—CRATS and SCRUTS have mandatory payouts. If we assume the trust must pay $100,000 (according to its type and its stated payout rate), $82,000 will be from the tier one income, but $18,000 will be needed from corpus, or principal. Where will the actual funds (not the characterization for the K-1) come from? Will the trustee have to sell some asset to produce the cash for distribution? Is there cash in an account deemed to be principal cash? If not, the trustee must sell some asset to make the payment. Will that produce capital gain realized and thus skew the result we came to above in the example, causing there to be gain in tier two? All of these questions must be addressed in order to do two very different things—(1) achieve sufficient cash to write the check for the trust payout, and (2) track the character of the distribution so it can be properly reported to the beneficiary on the beneficiary's Form 1040.

The same example will have different results in a net income trust, whether a NICRUT, a NIMCRUT, or a FlipCRUT before it flips. Those trusts must not distribute principal. They are limited to distributing the income. The shortfall, the income not distributed because of lack of income to make up the full fixed percentage payout becomes part of the deficiency, or IOU account. That shortfall or deficiency may be made up later to the beneficiary if there is excess income above the fixed percentage amount in a later year. The deficiency is considered a contingent liability, not an actual debt the beneficiary can ever claim.

A First Year Contribution Issue

Assets are booked into the CRT initially at basis for purposes of the four-tier system. Assume an asset is valued at $1,000,000 with a basis of $400,000. There is $600,000 of unrealized gain when it is transferred to the CRT. The trust records reflect a corpus (tier four) of $400,000 and a tier two capital gain of $600,000. Now let's assume the trustee decides to invest entirely in municipal bonds, the income of which is tax-exempt and within tier three.

According to the order in the four-tier system, the CRAT or CRUT must distribute $100,000 in the example above. This time the municipal bonds only earn $30,000. Where will the extra $70,000 come from? The trustee must sell of some contributed assets to have $70,000 more to distribute. That will actually diminish principal to $930,000. But because there is a tier two layer of $600,000 of capital gain on the books, that $70,000 of the mandatory distribution of $100,000 will be characterized as capital gain, not as return of corpus or principal, and therefore, it will be taxable to the recipient as capital gain (even though it came from the trust principal).

If this is an SCRUT (mandatory payment), the net year's opening value will be $930,000, reducing the unitrust amount to be paid out the following year to an unhappy beneficiary. If it is an annuity trust, the remainderman will be the unhappy one, as the payout is a sum certain that reduced principal.

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If this were a net income unitrust—either a NICRUT or a NIMCRUT—the payment would have been only $30,000, leaving the principal untouched.

For the planner, it is critical to understand this and work through some examples to understand both what type of trust to use and how to reinvest the proceeds of the sale of the contribute asset.

Later Issues Where Gain is Defined to be Included in Distributable Amount

An important note is that NIMCRUTs are sometimes used as a deferral of income or a retirement planning tool. The trust assets are invested for growth until the beneficiary is of retirement age (or mind), and then the trustee alters the investment to produce income. (Keep in mind the beneficiary cannot control or direct the trustee's investments!)

A FlipCRUT will not work in this scenario because the triggering event to cause the trust to flip cannot be within the control of the trustee or any other person. Also, when the FlipCRUT flips, the accumulated deficiency account is wiped out when the standard, fixed percentage payment begins at the first of the taxable year after the occurrence of the triggering event.

With a NIMCRUT used for deferral of income, often the definition of "income," or better put "distributable amount," is changed to include realized capital gains. This does not mean capital gains are suddenly moved into tier one for characterization in the hands of the beneficiary as ordinary income. Distributed capital gains are still recorded in tier two. It simply means realized capital gains are accessible for distribution to fulfill the fixed percentage amount. Thus, the retiree can benefit from a mix of ordinary income and capital gain where that is needed to fill the bucket, so to speak, and receive the full unitrust percentage if ordinary income is less than the fixed percentage.

Also note that use of gain as a portion or all of the distributable amount cannot access pre-contribution gain; only post-contribution gain can be distributed. The same is true of purchases made by the trustee—gain distributable does not include the purchase price (basis) of the asset purchased by the trustee, only post purchase price gain.

There are also special rules for different types of gain and loss, such as for collectibles (28%) and unrecaptured section 1250 gain. These are intricate and you are referred to the regulation to review these. Reg. Sec. 1.664-1(d)(1)(vi).

If there are multiple beneficiaries, each has a proportionate share of the characterization of the four-tier system.

The 3.8% Medicare Surtax Under IRC Section 1411

Although the topic of this new surtax is too long for in depth discussion here, it is important to note that it will affect distributions from CRTs.

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The surtax is assessed on (1) gross income from interest, dividends, rents, royalties and annuities, (2) gross income from passive activities or trade or business of trading in financial instruments or commodities, and (3) net gain realized.

The trust itself is exempt from the surtax under the new rules, but the beneficiary is not. Distributions from CRTs beginning on 1/1/13 will be affected if there is Net Investment Income or "NII." This will be accumulated just like the four-tier system accumulates "character" of receipts, but the Medicare tax system will have to be kept in a separate class of income within the "category" or tier. You may see Accumulated NII abbreviated as ANII. Because the NII (or ANII as the case may be) will be subject to the regular tax on ordinary income plus an additional amount of 3.8%, the total tax rate will be higher. Consistent with the rule that the highest rate of taxable income is carried out to the CRT beneficiary first, the NII or ANII of tier one will be deemed distributed before non-NII ordinary income.

This makes the accounting for the four-tier system just a little more complex.

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NOTES

From IRS instructions for Form 5227--

Ordering Rules for Ordinary Income

Section 664 Method		SNIIC Election Method
1. Distributions of all other ordinary income:		
	First, ordinary income that is NII (40.8% rate), then	All ordinary income class
	Ordinary income that is Excluded Income (37% rate)	
2. Distributions from the qualified dividends class:		
	First, qualified dividends that are NII (23.8% rate), then	All qualified dividends
	Qualified dividends that are Excluded Income (20% rate)	

Additional rules for capital gains and losses.

The following charts highlight the difference in netting and ordering rules for capital gains and losses depending on whether the CRT elects to use the Simplified Net Investment Income Calculation (SNIIC) method. In general, if the CRT elects to use the SNIIC method, the netting and ordering rules will be essentially the same as those applicable before the 2013 tax year; every dollar distributed will carry out the CRT's NII, to the extent of the CRT's accumulated NII, without regard to the class or category of that distribution for regular tax purposes. If the CRT uses the section 664 method for calculating NII and Excluded Income, the netting and ordering rules are expanded to take into account additional classes within the ordinary income and capital gain categories that are created due to the imposition of an additional 3.8% tax on NII but not on Excluded Income.

Netting rules.

Gains and losses are netted within each class to arrive at a net gain or loss for that class. After you net within a class, the following additional netting rules apply to the capital gains category.

Netting Rules

Section 664 Method		SNIIC Election Method
1.	Among the long-term capital gain and loss classes:	

		Section 664 Method	SNIIC Election Method
	(a)	A net loss from the 28% long-term capital gain class that is NII (31.8% rate) reduces net gains in the following order:	
		First, gain from the section 1250 long-term capital gain class that is NII (28.8% rate), then	Not Applicable
		Net gain from the 28% long-term capital gain class that is Excluded Income (28% rate), then	
		Gain from the section 1250 long-term capital gain class that is Excluded Income (25% rate), then	
		Net gain from all the other long-term capital gain class that is NII (23.8% rate), and finally	
		Net gain from all the other long-term capital gain class that is Excluded Income (20% rate).	
	(b)	A net loss from the 28% long-term capital gain class that is Excluded Income (28% rate) reduces net gains in the following order:	
		First, net gain from the 28% long-term capital gain class that is NII (31.8% rate), then	First, gain from the section 1250 long-term capital gain class, then
		Gain from the section 1250 long-term capital gain class that is NII (28.8% rate), then	
		Gain from the section 1250 long-term capital gain class that is Excluded Income (25% rate), then	Net gain from all the other long-term capital gain class.
		Net gain from all the other long-term capital gain class that is NII (23.8% rate), and finally	
		Net gain from all the other long-term capital gain class that is Excluded Income (20% rate).	
	(c)	A net loss from all the other long-term capital gain class that is NII (23.8% rate) reduces net gains in the following order:	

Section 664 Method			SNIIC Election Method
		First, net gain from the 28% long-term capital gain class that is NII (31.8% rate), then	Not Applicable
		Gain from the section 1250 long-term capital gain class that is NII (28.8% rate), then	
		Net gain from the 28% long-term capital gain class that is Excluded Income (28% rate), then	
		Gain from the section 1250 long-term capital gain class that is Excluded Income (25% rate), and finally	
		Net gain from all the other long-term capital gain class that is Excluded Income (20% rate).	
	(d)	A net loss from all the other long-term capital gain class that is Excluded Income (20% rate) reduces net gains in the following order:	
		First, net gain from the 28% long-term capital gain class that is NII (31.8% rate), then	First, net gain from the 28% long-term capital gain class, then
		Gain from the section 1250 long-term capital gain class that is NII (28.8% rate), then	
		Net gain from the 28% long-term capital gain class that is Excluded Income (28% rate), then	Gain from the section 1250 long-term capital gain class.
		Gain from the section 1250 long-term capital gain class that is Excluded Income (25% rate), and finally	
		Net gain from all the other long-term capital gain class that is NII (23.8% rate).	
2.	Among the short-term and long-term gain and loss classes:		
	(a)	A net short-term capital loss that is NII (40.8% rate) is applied to reduce the net short-term and net long-term capital gain classes as follows:	

Section 664 Method			SNIIC Election Method
		First, short-term capital gain class that is Excluded Income (37% rate), then	First, net gain from the 28% long-term capital gain class, then
		Net gain from the 28% long-term capital gain class that is NII (31.8% rate), then	
		Gain from the section 1250 long-term capital gain class that is NII (28.8% rate), then	Gain from the section 1250 long-term capital gain class, and finally
		Net gain from the 28% long-term capital gain class that is Excluded Income (28% rate), then	
		Gain from the section 1250 long-term capital gain class that is Excluded Income (25% rate), then	
		Net gain from all the other long-term capital gain class that is NII (23.8% rate), and finally	Net gain from all the other long-term capital gain class.
		Net gain from all the other long-term capital gain class that is Excluded Income (20% rate).	
	(b)	A net short-term capital loss that is Excluded Income (37% rate) is applied to reduce the net short-term and net long-term capital gain classes as follows:	
		First, short-term capital gain class that is NII (40.8% rate), then	
		Net gain from the 28% long-term capital gain class that is NII (31.8% rate), then	First, net gain from the 28% long-term capital gain class, then
		Gain from the section 1250 long-term capital gain class that is NII (28.8% rate), then	
		Net gain from the 28% long-term capital gain class that is Excluded Income (28% rate), then	Gain from the section 1250 long-term capital gain class, and finally
		Gain from the section 1250 long-term capital gain class that is Excluded Income (25% rate), then	

Section 664 Method			SNIIC Election Method
		Net gain from all the other long-term capital gain class that is NII (23.8% rate), and finally	Net gain from all the other long-term capital gain class.
		Net gain from all the other long-term capital gain class that is Excluded Income (20% rate).	
3.	An overall net long-term capital loss reduces any net short-term capital gain as follows:		
		First, any net short-term capital gain that is NII (40.8% rate), then	Overall net long-term capital loss reduces any net short-term capital gain.
		Any net short-term capital gain that is Excluded Income (37% rate).	

Ordering rules for capital gains and losses.

The following rules apply to undistributed long-term capital gains on assets held more than 1 year. If, in any tax year of the trust, the trust has both undistributed short-term capital gain and undistributed long-term capital gain, the short-term capital gain is deemed distributed before any long-term capital gain.

Ordering Rules for Capital Gains and Losses

Section 664 Method		SNIIC Election Method
1. Any short-term capital gains are deemed to be distributed in the following order:		
	First, short-term capital gain class that is NII (40.8% rate), then	Short-term capital gains
	Short-term capital gain class that is Excluded Income (37% rate).	
2. Any long-term capital gains are deemed to be distributed in the following order:		
	The 28% long-term capital gain class that is NII (31.8% rate) is deemed distributed, then	The 28% long-term capital gain class is deemed distributed, then

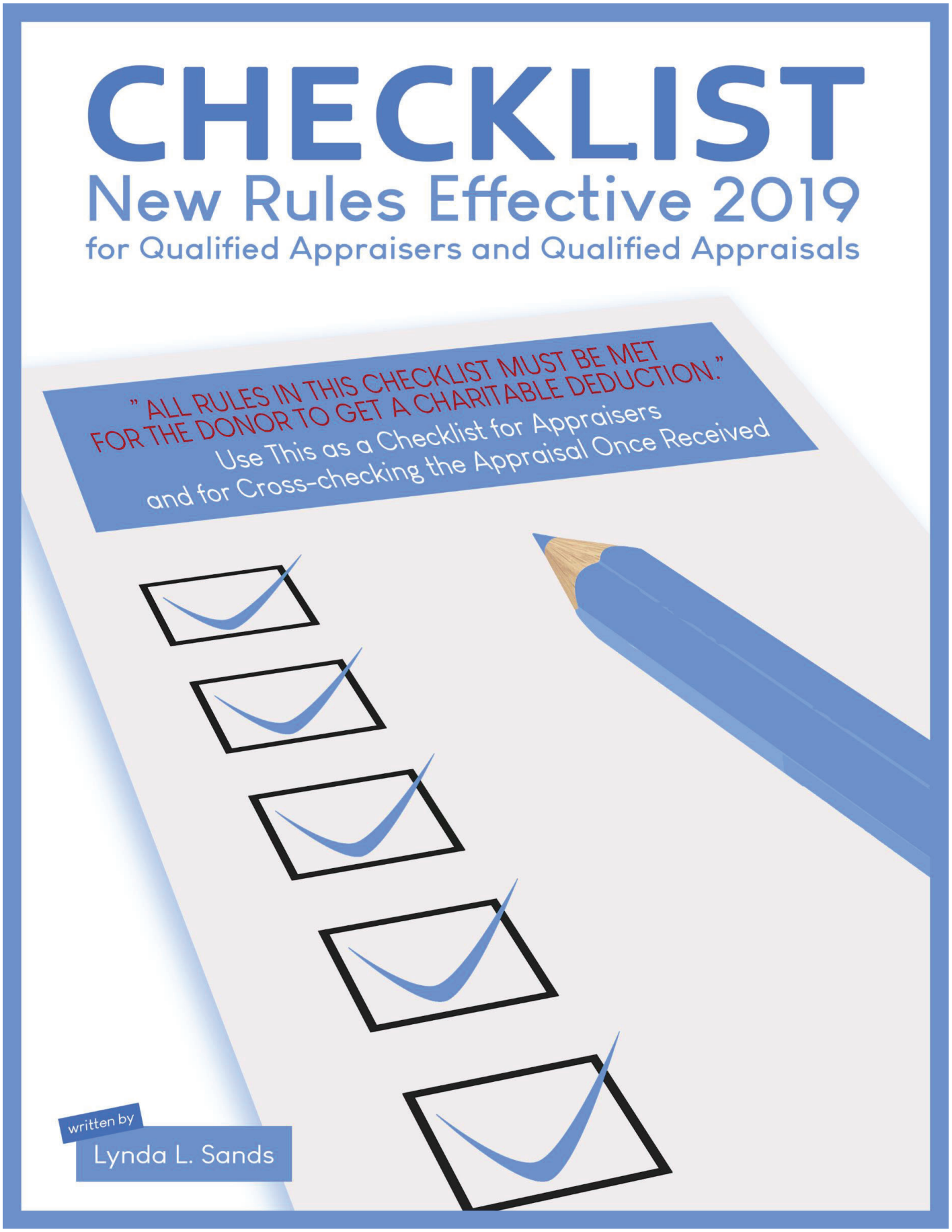
Section 664 Method	SNIIC Election Method
The section 1250 long-term capital gain class that is NII (28.8% rate) is deemed distributed, then	
The 28% long-term capital gain class that is Excluded Income (28% rate) is deemed distributed, then	The section 1250 long-term capital gain class is deemed distributed, and finally
The section 1250 long-term capital gain class that is Excluded Income (25% rate) is deemed distributed, then	
All other long-term capital gain class that is NII (23.8% rate) is deemed distributed, and finally	All other long-term capital gain class.
All other long-term capital gain class is deemed distributed.	

Carryover Rules

Section 664 Method	SNIIC Election Method
1. If the trust has capital losses in excess of capital gains for any tax year:	
The excess of the 40.8% rate net short-term capital loss over the net long-term capital gain for that year is a 40.8% rate short-term capital loss carryover to the next tax year.	The excess of the net short-term capital loss over the net long-term capital gain for that year is a short-term capital loss carryover to the next tax year.
The excess of the 37% rate net short-term capital loss over the net long-term capital gain for that year is a 37% rate short-term capital loss carryover to the next tax year.	
The excess of the 23.8% net long-term capital loss over the net short-term capital gain for that year is a 23.8% long-term capital loss carryover to the next tax year.	The excess of the net long-term capital loss over the net short-term capital gain for that year is a long-term capital loss carryover to the next tax year.
The excess of the 20% net long-term capital loss over the net short-term capital gain for that	

Section 664 Method	SNIIC Election Method
year is a 20% long-term capital loss carryover to the next tax year.	
2. If the trust has capital gains in excess of capital losses for any tax year:	
The excess of the 40.8% rate net short-term capital gain over the net long-term capital loss for that year is, to the extent not deemed distributed, a 40.8% rate short-term capital gain carryover to the next tax year.	The excess of the net short-term capital gain over the net long-term capital loss for that year is, to the extent not deemed distributed, a short-term capital gain carryover to the next tax year.
The excess of the 37% rate net short-term capital gain over the net long-term capital loss for that year is, to the extent not deemed distributed, a 37% rate short-term capital gain carryover to the next tax year.	
The excess of the 31.8% rate net long-term capital gain over the net short-term capital loss for that year is, to the extent not deemed distributed, a 31.8% rate long-term capital gain carryover to the next tax year.	The excess of the net long-term capital gain over the net short-term capital loss for that year is, to the extent not deemed distributed, a long-term capital gain carryover to the next tax year.
The excess of the 28.8% rate net long-term capital gain over the net short-term capital loss for that year is, to the extent not deemed distributed, a 28.8% rate long-term capital gain carryover to the next tax year.	
The excess of the 28% rate net long-term capital gain over the net short-term capital loss for that year is, to the extent not deemed distributed, a 28% rate long-term capital gain carryover to the next tax year.	
The excess of the 25% rate net long-term capital gain over the net short-term capital loss for that year is, to the extent not deemed distributed, a 25% rate long-term capital gain carryover to the next tax year.	

Section 664 Method		SNIIC Election Method
	The excess of the 23.8% rate net long-term capital gain over the net short-term capital loss for that year is, to the extent not deemed distributed, a 23.8% rate long-term capital gain carryover to the next tax year.	
	The excess of the 20% rate net long-term capital gain over the net short-term capital loss for that year is, to the extent not deemed distributed, a 20% rate long-term capital gain carryover to the next tax year.	


CHECKLIST
New Rules Effective 2019
for Qualified Appraisers and Qualified Appraisals
" ALL RULES IN THIS CHECKLIST MUST BE MET FOR THE DONOR TO GET A CHARITABLE DEDUCTION."
Use This as a Checklist for Appraisers
and for Cross-checking the Appraisal Once Received
written by
Lynda L. Sands

CHECKLIST

By Lynda L. Sands

New Rules Effective 2019 for Qualified Appraisers and Qualified Appraisals: Use This as a Checklist for Appraisers and for Cross-checking the Appraisal Once Received. "IF YOUR APPRAISAL AND APPRAISER DO NOT MEET ALL OF THESE RULES, A CHARITABLE DEDUCTION CAN BE DENIED BY THE IRS!

(SEE TREAS. REG. SEC. 170A-17(a) AND (b)

I. QUALIFIED APPRAISER: BEFORE HIRING YOUR APPRAISER, DOES YOUR APPRAISER MEET ALL OF THESE RULES AS A QUALIFIED APPRAISER?

A "qualified appraiser" is an individual with (1) verifiable education and experience, (2) valuing the type of property which is the subject of the appraisal, and meets the following requirements:

❑ **A. Education and Experience**

1. At the time of signing the appraisal, the individual has successfully completed professional or college-level coursework in valuing this type of property.

2. The individual has two or more years' experience in valuing this type of property. OR

3. The individual has earned a recognized appraiser designation for the type of property to be appraised.

❑ **B. Coursework Defined**

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1. Coursework must be obtained from a professional or college -level educational organization that regularly offers programs in valuing the type of property in question. OR

2. Coursework must be obtained from a generally recognized professional trade or appraiser organization that regularly offers education in valuing the type of property in question. OR

3. Coursework must be obtained from an employer as part of an employee apprenticeship or educational program substantially similar to the educational programs in 1 and 2 above.

❑ C. Type of Property Defined

1. Type of property means the *category* of property customary in the appraisal field for an appraiser to value.

2. Coursework in valuing the type of property, but maybe not this narrow subset of the type of property.

3. Experience in valuing type of property, but maybe not this narrow subset of the type of property.

4. No experience in valuing the type of property—the appraiser is not qualified.

❑ D. Verifiable Defined

1. Appraiser must specify in the appraisal that he or she has the education and experience in valuing the type of property.

2. Appraiser must make a declaration in the appraisal that because of his or her education and experience he or she is qualified to make appraisals of the type of property in question.

❑ E. Individuals Who Are Not Qualified Appraisers

1. An individual who receives a fee prohibited by these rules.

2. The donor of the property.

3. A party to the transaction (sale, exchange, gift) in which the donor acquired the property, and any agent of the transferor or the donor (unless the gift was made within 2 months of the acquisition and the appraised value does not exceed the acquisition price.

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www.dogtailpress.com

4. The donee of the property.

5. Any individual related to or employee of the donor, a party to the transaction (see number 3), or the donee.

6. Any individual married to anyone described in number 5 above.

7. An independent contractor regularly used as an appraiser by the donor, a party to the transaction (see number 3), or the donee, who doesn't perform a majority of his or her appraisals for others in the taxable year of the appraisal.

8. An individual prohibited from practicing before the IRS under 31 USC section 330(c) at any time during the 3 years ending on the date of the appraisal.

II. QUALIFIED APPRAISAL (BY A QUALIFIED APPRAISER): DOES YOUR APPRAISAL MEET ALL OF THESE RULES?

A "qualified appraisal" means an appraisal document that is prepared by a qualified appraiser (see above PART ONE) in accordance with generally accepted appraisal standards, plus **all** of the following items listed here.

❑ A. Information Required About the Contributed Property

1. A description of the property, including value, so that a person unfamiliar with the type of property can understand that the appraised property is the contributed property.

2. The condition of the property, if real property or tangible property.

3. The valuation effective date (see below)

4. The fair market value on the valuation effective date.

❑ B. The Terms of Any Agreement

1. Agreements or understandings about the use, sale or disposition of the property

2. Any agreement restricting the donee's right to use or dispose of the property

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3. Any agreement on the rights to income, possession, vote securities, acquire property by purchase, or designating any person having these rights

4. Agreements or understandings about earmarking the property for a particular use

❑ **C. The Date of Contribution**

1. The date of contribution, or

2. The expected date of contribution

❑ **D. Information about the Appraiser**

1. Name, address and taxpayer ID number

2. Qualifications to value this type of property

3. Education and experience of appraiser

4. Whether the appraiser is a partner in a partnership or is an employee, or an independent contractor of another and if so, the tax ID number of that other entity or employer who hired or engaged the appraiser

❑ **E. Appraiser Additions Required**

1. Signature of Appraiser

2. Date signed by appraiser (appraisal report date)

3. Declaration of Appraiser (required exactly as is)

> "I understand that my appraisal will be used in connection with a return or claim for refund. I also understand that, if there is a substantial or gross valuation misstatement of the value of the property claimed on the return or claim for refund that is based on my appraisal, I may be subject to a penalty under section 6695A of the Internal Revenue Code, as well as other applicable penalties. I affirm that I have not been at any time in the three-year period ending on the date of the appraisal barred from presenting evidence or testimony before the Department of the Treasury or the Internal Revenue Service pursuant to 31 U.S.C. 330(c)".

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4. A statement that the appraisal was prepared for income tax purposes

5. The method used to determine the fair market value

6. The specific basis for the valuation—comps, statistic sampling and explanations of such sampling

❑ F. Timeliness

1. The appraisal must be signed and dated *no earlier than* 60 days before the date of contribution (it appears the date of contribution could be on day 61)

2. The appraisal must be signed and dated *no later than* –

-the due date including extensions of the tax return on which the deduction is first claimed

-if the donor is a partnership or S corporation, the due date including extensions on which the deduction is first reported

-if the deduction is first claimed on an amended return, the date on which the amended return is filed.

❑ G. Valuation Effective Date

1. The date to which the valuation applies

2. Where the appraisal report is dated before the date of contribution, the "valuation effective date" cannot be more than 60 days before the date of contribution and no later than the date of contribution

3. Where the appraisal report is dated on or after the date of contribution, the "valuation effective date" must be the date of contribution

❑ H. Donor Knowledge of Falsity

1. Where donor misstated facts or failed to disclose facts, the appraisal is not qualified

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2. Where a reasonable person would expect this failure or misrepresentation to cause a misstatement of value, the appraisal is not qualified

❑ I. Time of Receipt

1. The appraisal must be received by the donor before the due date of the tax return on which the deduction is first claimed (including extensions). If the donor is a partnership or S corporation, then by the time the deduction is reported.

2. If the deduction is first claimed (or reported) on an amended return, the appraisal must be received by the date on which the amended return is filed.

❑ J. Prohibited Appraisal Fees

1. The fee for the appraisal cannot be based on the appraised value.

2. The fee cannot be based on the amount of the appraised value as allowed after examination by the IRS.

❑ K. Retention of Appraisal

1. The donor must retain the appraisal for as long as it is "relevant" in the administration of the internal revenue laws. (Figure that one out).

❑ L. Appraiser Prohibited From Practice Before IRS

1. If the appraiser has been prohibited from practice under 31 United States Code section 330(c) at any time during the three years prior to the date the appraisal was signed by him or her, the appraisal will be disregarded.

2. However, it may be accepted as a qualified appraisal if the donor had no knowledge that the signature, date, or declaration was false when the appraiser signed the appraisal and Form 8283. (All rules of qualified appraisal would have to be met to meet this exception).

❑ M. Partial Interest

1. If the contributed property is a partial interest, the appraisal must be of the partial interst.

❑ N. When More Than One Property is Contributed

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1. A group of "similar items" may be the subject of one appraisal

2. If not is this group of "similar items", each property must have its own appraisal

III. Filing Form 8283 with Donor's Form 1040

❑ **Section B (backside)**

1. Use this section for gifts where the amount of the deduction claimed on the donor's Form 1040 is more than $5,000.

2. Part I section 4, make sure to check off one of the boxes.

3. Part I section 5, you must complete all subsections (a) through (h)f or mark N/A if not applicable. There are famous (or infamous) court or IRS cases where millions of dollars of deductions have been lost for failure to fill in every single applicable fact, such as a recent case where the deduction was entirely lost because "(f) basis" was not filled in, and the time to refile the 8283 had passed.

4. Carefully read Part II to determine if a donor signature is needed here.

5. Part III must be signed by the Qualified Appraiser who performed the Qualified Appraisal. Note his or her Tax ID number must be on this form. It is a way the IRS cross-checks appraisals, deductions and sales of property by donee (Form 8282).

6. Part IV requires that a recipient charitable organization sign this form acknowledging it is a qualified organization under Internal Revenue Code section 170(c). If a gift is given to a charitable remainder or lead trust, there is no indication in the instructions to this form whether the trustee must sign. As a precaution, you may want to have the trustee sign Form 8283 and file Form 8282 when the asset is sold from the trust. The officer of an organization who signs this form must have been delegated specific authority to sign.

7. Form 8283 must be filed with the donor's Form 1040 on which the deduction is claimed. Failure to do so will result in loss of deduction.

8. CAUTION: A contemporaneous written acknowledgement from the charity may also be necessary in order to claim a deduction.

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IV. Filing Form 8282 by Donee

❑ 1. The donee who must sign this form may be the original donee, or a successor donee to whom the original donee transferred the asset(s). Read the "Parts to Complete" carefully to determine which sections the donee must fill in. All filers must fill in the Identifying Information section. See Parts I and II.

❑ 2. Part III, fill in all information and especially pay attention to filling out line 8, Amount received on disposition. This cross-checks with the From 8283.

❑ 3. The officer signing this form swears under penalty of perjury. Please read Part IV Certification carefully.

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NOTES

Form **8283**
(Rev. December 2023)
Department of the Treasury
Internal Revenue Service

Noncash Charitable Contributions

Attach one or more Forms 8283 to your tax return if you claimed a total deduction of over $500 for all contributed property.
Go to *www.irs.gov/Form8283* for instructions and the latest information.

OMB No. 1545-0074
Attachment Sequence No. **155**

Name(s) shown on your income tax return | **Identifying number**

Enter the entity name and identifying number from the tax return where the noncash charitable contribution was originally reported, if different from above.

Name: _____ Identifying number: _____

Check this box if a family pass-through entity made the noncash charitable contribution. See instructions . . . . . ☐

Note: Figure the amount of your contribution deduction before completing this form. See your tax return instructions.

Section A. Donated Property of $5,000 or Less and Publicly Traded Securities—List in this section **only** an item (or a group of similar items) for which you claimed a deduction of $5,000 or less. Also list publicly traded securities and certain other property even if the deduction is more than $5,000. If you need more space, attach a statement. See instructions.

1	**(a)** Name and address of the donee organization	**(b)** If donated property is a vehicle (see instructions), check the box. Also enter the vehicle identification number (unless Form 1098-C is attached).	**(c)** Description and condition of donated property (For a vehicle, enter the year, make, model, and mileage. For securities and other property, see instructions.)
A		☐	
B		☐	
C		☐	
D		☐	

Note: If the amount you claimed as a deduction for an item is $500 or less, you do not have to complete columns (e), (f), and (g).

	(d) Date of the contribution	**(e)** Date acquired by donor (mo., yr.)	**(f)** How acquired by donor	**(g)** Donor's cost or adjusted basis	**(h)** Fair market value (see instructions)	**(i)** Method used to determine the fair market value
A						
B						
C						
D						

Section B. Donated Property Over $5,000 (Except Publicly Traded Securities, Vehicles, Intellectual Property or Inventory Reportable in Section A)—Complete this section for one item (or a group of similar items) for which you claimed a deduction of more than $5,000 per item or group (except contributions reportable in Section A). Provide a separate form for each item donated unless it is part of a group of similar items. A qualified appraisal is required for items reportable in Section B and in certain cases must be attached. See instructions.

Part I Information on Donated Property

2 Check the box that describes the type of property donated. See instructions for definitions.

- **a** ☐ Art (contribution of $20,000 or more)
- **b** ☐ Qualified conservation contribution
- **b(1)** ☐ Certified historic structure
  NPS # _____
- **c** ☐ Art (contribution of less than $20,000)
- **d** ☐ Other real estate
- **e** ☐ Equipment
- **f** ☐ Securities
- **g** ☐ Collectibles
- **h** ☐ Intellectual property
- **i** ☐ Vehicles
- **j** ☐ Clothing and household items
- **k** ☐ Digital assets
- **l** ☐ Other

3	**(a)** Description of donated property (if you need more space, attach a separate statement)	**(b)** If any tangible personal property or real property was donated, give a brief summary of the overall physical condition of the property at the time of the gift.	**(c)** Appraised fair market value
A			
B			
C			

	(d) Date acquired by donor (mo., yr.)	**(e)** How acquired by donor	**(f)** Donor's cost or adjusted basis	**(g)** For bargain sales, enter amount received	**(h)** Qualified conservation contribution relevant basis (see instructions)	**(i)** Amount claimed as a deduction (see instructions)
A						
B						
C						

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Form 8283 (Rev. 12-2023) Page **2**

Name(s) shown on your income tax return | **Identifying number**

Part II **Partial Interests and Restricted Use Property (Other Than Qualified Conservation Contributions)—** Complete lines 4a through 4e if you gave less than an entire interest in a property listed in Section B, Part I. Complete lines 5a through 5c if conditions were placed on a contribution listed in Section B, Part I; also attach the required statement. See instructions.

4a Enter the letter from Section B, Part I that identifies the property for which you gave less than an entire interest _____
If Section B, Part II applies to more than one property, attach a separate statement.

b Total amount claimed as a deduction for the property listed in Section B, Part I: **(1)** For this tax year . . _____
(2) For any prior tax years _____

c Name and address of each organization to which any such contribution was made in a prior year (complete only if different from the donee organization in Section B, Part V, below):
Name of charitable organization (donee)

Address (number, street, and room or suite no.) | City or town, state, and ZIP code

d For tangible property, enter the place where the property is located or kept _____

e Name of any person, other than the donee organization, having actual possession of the property _____

		Yes	**No**
5a	Is there a restriction, either temporary or permanent, on the donee's right to use or dispose of the donated property?		
b	Did you give to anyone (other than the donee organization or another organization participating with the donee organization in cooperative fundraising) the right to the income from the donated property or to the possession of the property, including the right to vote donated securities, to acquire the property by purchase or otherwise, or to designate the person having such income, possession, or right to acquire?		
c	Is there a restriction limiting the donated property for a particular use?		

Part III **Taxpayer (Donor) Statement—**List each item included in Section B, Part I above that the appraisal identifies as having a value of $500 or less. See instructions.

I declare that the following item(s) included in Section B, Part I above has to the best of my knowledge and belief an appraised value of not more than $500 (per item). Enter identifying letter from Section B, Part I and describe the specific item. See instructions.

Signature of taxpayer (donor) | Date

Part IV **Declaration of Appraiser—**See instructions.

I declare that I am not the donor, the donee, a party to the transaction in which the donor acquired the property, employed by, or related to any of the foregoing persons, or married to any person who is related to any of the foregoing persons. And, if regularly used by the donor, donee, or party to the transaction, I performed the majority of my appraisals during my tax year for other persons.

Also, I declare that I perform appraisals on a regular basis; and that because of my qualifications as described in the appraisal, I am qualified to make appraisals of the type of property being valued. I certify that the appraisal fees were not based on a percentage of the appraised property value. Furthermore, I understand that a false or fraudulent overstatement of the property value as described in the qualified appraisal or this Form 8283 may subject me to the penalty under section 6701(a) (aiding and abetting the understatement of tax liability). I understand that my appraisal will be used in connection with a return or claim for refund. I also understand that, if there is a substantial or gross valuation misstatement of the value of the property claimed on the return or claim for refund that is based on my appraisal, I may be subject to a penalty under section 6695A of the Internal Revenue Code, as well as other applicable penalties. I affirm that I have not been at any time in the three-year period ending on the date of the appraisal barred from presenting evidence or testimony before the Department of the Treasury or the Internal Revenue Service pursuant to 31 U.S.C. 330(c).

Sign Here

Appraiser signature | Date

Appraiser name | Title

Business address (including room or suite no.) | **Identifying number**

City or town, state, and ZIP code

Part V **Donee Acknowledgment—**See instructions.

This charitable organization acknowledges that it is a qualified organization under section 170(c) and that it received the donated property as described in Section B, Part I, above on the following date _____
Furthermore, this organization affirms that in the event it sells, exchanges, or otherwise disposes of the property described in Section B, Part I (or any portion thereof) within 3 years after the date of receipt, it will file **Form 8282**, Donee Information Return, with the IRS and give the donor a copy of that form. This acknowledgment does not represent agreement with the claimed fair market value.

Does the organization intend to use the property for an unrelated use? . . . . . ☐ **Yes** ☐ **No**

Name of charitable organization (donee) | **Employer identification number**

Address (number, street, and room or suite no.) | City or town, state, and ZIP code

Authorized signature | Title | Date

Form **8283** (Rev. 12-2023)

Form **8282**
(Rev. October 2021)
Department of the Treasury
Internal Revenue Service

Donee Information Return

(Sale, Exchange, or Other Disposition of Donated Property)

► **Go to *www.irs.gov/Form8282* for latest information.**

OMB No. 1545-0047

Give a Copy to Donor

Parts To Complete

- If the organization is an **original donee,** complete *Identifying Information,* Part I (lines 1a–1d and, if applicable, lines 2a–2d), and Part III.
- If the organization is a **successor donee,** complete *Identifying Information,* Part I, Part II, and Part III.

Identifying Information

Print or Type

Name of charitable organization (donee)	**Employer identification number**
Address (number, street, and room or suite no.) (or P.O. box no. if mail is not delivered to the street address)	
City or town, state, and ZIP code	

Part I Information on ORIGINAL DONOR and SUCCESSOR DONEE Receiving the Property

1a Name of original donor of the property	**1b Identifying number(s)**
1c Address (number, street, and room or suite no.) (P.O. box no. if mail is not delivered to the street address)	
1d City or town, state, and ZIP code	

Note. Complete lines 2a–2d only if the organization gave this property to another charitable organization (successor donee).

2a Name of charitable organization	**2b Employer identification number**
2c Address (number, street, and room or suite no.) (or P.O. box no. if mail is not delivered to the street address)	
2d City or town, state, and ZIP code	

Part II Information on PREVIOUS DONEES. Complete this part only if the organization was not the first donee to receive the property. See the instructions before completing lines 3a through 4d.

3a Name of original donee	**3b Employer identification number**
3c Address (number, street, and room or suite no.) (or P.O. box no. if mail is not delivered to the street address)	
3d City or town, state, and ZIP code	
4a Name of preceding donee	**4b Employer identification number**
4c Address (number, street, and room or suite no.) (or P.O. box no. if mail is not delivered to the street address)	
4d City or town, state, and ZIP code	

For Paperwork Reduction Act Notice, see Instructions for Form 990. Cat. No. 62307Y Form **8282** (Rev. 10-2021)

Part III Information on DONATED PROPERTY

	1. Description of the donated property sold, exchanged, or otherwise disposed of and how the organization used the property. (If you need more space, attach a separate statement.)	2. Did the disposition involve the organization's entire interest in the property?		3. Was the use related to the organization's exempt purpose or function?		4. Information on use of property. • If you answered "Yes" to question 3 and the property was tangible personal property, describe how the organization's use of the property furthered its exempt purpose or function. Also complete Part IV below. • If you answered "No" to question 3 and the property was tangible personal property, describe the organization's intended use (if any) at the time of the contribution. Also complete Part IV below, if the intended use at the time of the contribution was related to the organization's exempt purpose or function and it became impossible or infeasible to implement.
		Yes	No	Yes	No	
A						
B						
C						
D						

		Donated Property			
		A	B	C	D
5	Date the organization received the donated property (MM/DD/YY)	/ /	/ /	/ /	/ /
6	Date the original donee received the property (MM/DD/YY)	/ /	/ /	/ /	/ /
7	Date the property was sold, exchanged, or otherwise disposed of (MM/DD/YY)	/ /	/ /	/ /	/ /
8	Amount received upon disposition	$	$	$	$

Part IV Certification

You must sign the certification below if any property described in Part III above is tangible personal property and:

- You answered "Yes" to question 3 above, or
- You answered "No" to question 3 above and the intended use of the property became impossible or infeasible to implement.

Under penalties of perjury and the penalty under section 6720B, I certify that either: (1) the use of the property that meets the above requirements, and is described above in Part III, was substantial and related to the donee organization's exempt purpose or function; or (2) the donee organization intended to use the property for its exempt purpose or function, but the intended use has become impossible or infeasible to implement.

▶ Signature of officer _____ Title _____ ▶ Date _____

Sign Here

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete.

▶ Signature of officer _____ Title _____ ▶ Date _____

Type or print name _____

General Instructions

Section references are to the Internal Revenue Code.

Future developments. For the latest information about developments related to Form 8282 and its instructions, such as legislation enacted after they were published, go to *www.irs.gov/Form8282*.

Purpose of Form

Donee organizations use Form 8282 to report information to the IRS and donors about dispositions of certain charitable deduction property made within 3 years after the donor contributed the property.

Definitions

CAUTION *For Form 8282 and these instructions, the term "donee" includes all donees, unless specific reference is made to "original" or "successor" donees.*

Original donee. The first donee to or for which the donor gave the property. The original donee is required to sign Form 8283, Noncash Charitable Contributions, *Section B. Donated Property Over $5,000 (Except Certain Publicly Traded Securities),* presented by the donor for charitable deduction property.

Successor donee. Any donee of property other than the original donee.

Charitable deduction property. Any donated property (other than money and publicly traded securities) if the claimed value exceeds $5,000 per item or group of similar items donated by the donor to one or more donee organizations. This is the property listed in Section B on Form 8283.

Who Must File

Original and successor donee organizations must file Form 8282 if they sell, exchange, consume, or otherwise dispose of (with or without consideration) charitable deduction property (or any portion) within 3 years after the date the original donee received the property. See *Charitable deduction property* above.

If the organization sold, exchanged, or otherwise disposed of motor vehicles, airplanes, or boats, see Pub. 526, Charitable Contributions.

Exceptions. There are two situations where Form 8282 does not have to be filed.

1. Items valued at $500 or less. The organization does not have to file Form 8282 if, at the time the original donee signed Section B of Form 8283, the donor had signed a statement on Form 8283 that the appraised value of the specific item was not more than $500. If Form 8283 contains more than one item, this exception applies only to those items that are clearly identified as having a value of $500 or less. However, for purposes of the donor's determination of whether the appraised value of the item exceeds $500, all shares of nonpublicly traded stock, or items that form a set, are considered one item. For example, a collection of books written by the same author, components of a stereo system, or six place settings of a pattern of silverware are considered one item.

2. Items consumed or distributed for charitable purpose. The organization does not have to file Form 8282 if an item is consumed or distributed, without consideration, in fulfilling your purpose or function as a tax-exempt organization. For example, no reporting is required for medical supplies consumed or distributed by a tax-exempt relief organization in aiding disaster victims.

When To File

If the organization disposes of charitable deduction property within 3 years of the date the original donee received it and the organization does not meet exception 1 or 2 above, the organization must file Form 8282 within 125 days after the date of disposition.

Exception. If the organization did not file because it had no reason to believe the substantiation requirements applied to the donor, but the organization later becomes aware that the substantiation requirements did apply, the organization must file Form 8282 within 60 days after the date it becomes aware it was liable. For example, this exception would apply where Section B of Form 8283 is furnished to a successor donee after the date that donee disposes of the charitable deduction property.

Missing information. If Form 8282 is filed by the due date, enter the organization's name, address, and employer identification number (EIN) and complete at least Part III, columns 1, 2, 3, and 4; and Part IV. The organization does not have to complete the remaining items if the information is not available. For example, the organization may not have the information necessary to complete all entries if the donor did not make Section B of Form 8283 available.

Where To File

Send Form 8282 to the Department of Treasury, Internal Revenue Service Center, Ogden, UT 84201-0027.

Other Requirements

Information the organization must give a successor donee. If the property is transferred to another charitable organization within the 3-year period discussed earlier, the organization must give the successor donee all of the following information.

1. The name, address, and EIN of the organization.

2. A copy of Section B of Form 8283 that the organization received from the donor or a preceding donee. The preceding donee is the one who gave the organization the property.

3. A copy of this Form 8282, within 15 days after the organization files it.

The organization must furnish items 1 and 2 above within 15 days after the latest of the date:

- The organization transferred the property,
- The original donee signed Section B of Form 8283, or
- The organization received a copy of Section B of Form 8283 from the preceding donee if the organization is also a successor donee.

Information the successor donee must give the organization. The successor donee organization to whom the organization transferred this property is required to give the organization its name, address, and EIN within 15 days after the later of:

- The date the organization transferred the property, or
- The date the successor donee received a copy of Section B of Form 8283.

Information the organization must give the donor. The organization must give a copy of Form 8282 to the original donor of the property.

Recordkeeping. The organization must keep a copy of Section B of Form 8283 in its records.

Penalties

Failure to file penalty. The organization may be subject to a penalty if it fails to file this form by the due date, fails to include all of the information required to be shown on the filed form, or includes incorrect information on the filed form. The penalty is generally $50 per form. For more details, see sections 6721 and 6724.

Fraudulent identification of exempt use property. A $10,000 penalty may apply to any person who identifies in Part III tangible personal property the organization sold, exchanged, or otherwise disposed of, as having a use that is related to a purpose or function knowing that such property was not intended for such a use. For more details, see section 6720B.

Specific Instructions

Part I

Line 1a. Enter the name of the original donor.

Line 1b. The donor's identifying number may be either an employer identification number or a social security number, and should be the same number provided on page 2 of Form 8283.

Line 1c and 1d. Enter the last known address of the original donor.

Lines 2a–2d. Complete these lines if the organization gave the property to another charitable organization successor donee (defined earlier). If the organization is an original donee, skip Part II and go to Part III.

Part II

Complete Part II only if the organization is a successor donee. If the organization is the original donee, do not complete any lines in Part II; go directly to Part III.

If the organization is the **second donee**, complete lines 3a through 3d. If the organization is the **third or later donee,** complete lines 3a through 4d. On lines 4a through 4d, give information on the preceding donee.

Part III

Column 1. For charitable deduction property that the organization sold, exchanged, or otherwise disposed of within 3 years of the original contribution, describe each item in detail. For a motor vehicle, include the vehicle identification number. For a boat, include the hull identification number. For an airplane, include the aircraft identification number. Additionally, for the period of time the organization owned the property, explain how it was used. If additional space is needed, attach a statement.

Column 3. Check "Yes" if the organization's use of the charitable deduction property was related to its exempt purpose or function. Check "No" if the organization sold, exchanged, or otherwise disposed of the property without using it.

Part IV

Certification. Sign and date the certification if any property described in Part III is tangible personal property and you answered "Yes" to Part III, question 3, or you answered "No" to Part III, question 3 and the intended use of the property became impossible or infeasible to implement.

Signature

Form 8282 is not valid unless it is signed by an officer of the organization. Be sure to include the title of the person signing the form and the date the form was signed.

How To Get Tax Help

Internet

You can access the IRS website 24 hours a day, 7 days a week, at *www.IRS.gov* to:

- Download forms and publications.
- Order IRS products online.
- Research your tax questions online.
- Search publications online by topic or keyword.
- Use the online Internal Revenue Code (IRC), Regulations, or other official guidance.
- View Internal Revenue Bulletins (IRBs) published in the last few years.
- Sign up to receive local and national tax news by email. To subscribe, visit *www.irs.gov/Charities*.

Ordering Forms and Publications

Visit *www.irs.gov/Formspubs* to download forms and publications. Otherwise, you can go to *www.irs.gov/OrderForms* to order current and prior-year forms and instructions. Your order should arrive within 10 business days.

Phone Help

If you have questions and/or need help completing this form, please call 877-829-5500. This toll-free telephone service is available Monday through Friday.

M E M O R A N D U M

TO: *Friends and Clients*
FROM: *Lynda L . Sands*
SUBJECT : *CAUTlON!Avoid capital gains being taxed to the donor of a charitable remainder trust!*

THE OBJECTIVE
Avoid the Capital Gains Tax

A transfer of appreciated property to a charitable remainder trust ("CRT") generally does not cause gain to be taxed to the donor Meanwhile, the Internal Revenue Code allows a donor to a CRT a charitable contribution deduction in the amount of the fair market value of the remainder interest in the property transferred. In addition, CRTs themselves are generally exempt from income tax on the gain realized from the sale of contributed property. However; the donor's avoidance of the capital gains tax can be lost if the gift is not structured properly.

THE PROBLEM
"Prearranged Sale"

Suppose an individual taxpayer, D, wants to sell a parcel of rental property and retire to Palm Springs. She contacts a real estate broker and lists the property for sale. The broker finds a buyer, who signs an earnest money agreement. Then the taxpayer talks to her CPA, who says if the property is sold it will generate taxable capital gain of almost $1 million, and federal income tax of almost $280,000. D thus decides to contribute the property to a CRT and have the CRT sell the property in the hopes of avoiding capital gain tax on the sale of the property and obtaining a charitable contribution deduction.

A transaction such as that described above may run afoul of the "assignment of income" and "step transaction" doctrines. The assignment of income doctrine says that income is taxed to the person who earned it. This doctrine prevents a person from transferring the rights to receive (and be taxed on) the income after he or she has completed all of the steps necessary to earn the income (which, by the way, includes capital gain). Under the step transaction doctrine, the IRS looks at the beginning of the transaction and the end result of the transaction. If the same end result could have been reached in fewer steps, and some of the steps have no independent significance or purpose (other than tax avoidance), then the IRS will attempt to "collapse" the transaction.

In the planned giving context, these concepts are often called a "prearranged sale," where the donor took all the steps necessary to make a sale of his or her property. This may cause the donor of property to recognize capital gain when the property is sold by the CRT. If at the time of the gift to the CRT the donor has progressed too far along in his or her efforts to sell the property, the IRS will treat the donor as having sold the property personally and then having contributed the proceeds to the CRT. The courts have supported the IRS in this type of conclusions by holding that "the transaction must be viewed as a whole, and each step, from the commencement of negotiations to the consummation of the sale, is relevant."

The safest way to avoid this recharacterization is to make the gift to the CRT before any efforts to sell are underway. However, because the donor is often unsure of the marketability of the property, or because the donor is unaware of the benefits of a CRT, the donor will often "test" the market or begin the negotiation process before structuring the CRT transaction. How far can a donor go without creating a prearranged sale?

Some courts have been lenient, but only where the ultimate sale is truly effected and finalized by the CRT or trustee. The courts have held that even where the donor had voting control of a corporate purchaser of the property from the CRT, the CRT trustee is nevertheless in control of the sale unless the CRT is "legally bound," or can be compelled by the buyer to sell the property. "Legally bound" does not only mean contracts in writing; oral agreements may also cause problems in this context. The courts have held there is no prearranged sale when, at the time of contribution, the buyer and donor had yet to resolve significant terms of the sale.

THE SOLUTION
The Donor Should Ask the Following Questions:

1. Can the CRT trustee turn its back on any negotiations regarding the sale of the property without being compelled by the purchaser to go forward with the sale?

2. Can the CRT trustee amend the terms of the sale freely without being compelled to follow the sale plans of the donor?

3. Are there significant terms to be completed by the CRT trustee?

If the answer to any one of the foregoing questions is "yes," it is likely that legal title to the property has passed to the CRT before a sale has become "a done deal," and that the CRT trustee made the sale, not the donor. If the trustee of the CRT truly holds legal title, and controls the decision whether and how to sell the property, the gain should be avoided by the donor

Ph: 858-414-0800:
Lyndasands@me.com

THE PERILS OF PRE-ARRANGED SALES

Phrases that Provide Important Clues

The case law in this arena shows that there are certain phrases which can provide a big clue as to how the courts will construe a gift.

Here's a cheat sheet to help you identify the phrases to look for. Check these out:

Conduit

- Is it a "...conduit through which to pass title"?[1] If yes, then it may be treated as a pre-arranged sale.

Two-prong test

- *2-prong test*: 1. Is it a valid, completed gift? 2. Was the donee legally bound or could be compelled to sell the appreciated property?[2] To avoid a pre-arranged sale, the 1st prong must show a valid, completed gift, and the second prong must show that the donee was not legally bound and could not be compelled to sell the appreciated property.

Valid, binding gift

- Was it a "valid, binding, and irrevocable gift"?[3] To avoid being a pre-arranged sale, the gift must be valid, binding, and irrevocable.

Dominion and control

- "Did the donor part with all dominion and control over the donated property?" If so, the gift was complete.[4] If the donor retains dominion and control over the donated property, then it is likely a pre-arranged sale.

Before property gives rise to income

- "A gift of appreciated property does not result in income to the donor **so long as he gives the property away absolutely and parts with title** thereto before the property gives rise to income by way of sale."[5]

Donee legally bound or compelled to surrender

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[1]

[2] Humacid Co., 42 TC 894 (1964).

[3] Ankey, TCM 1987-247

[4] Carrington v. Commissioner of Internal Revenue, 476 F.2d 704, 708 (5th Cir. 1973).

[5] Carrington v. Commissioner of Internal Revenue, 476 F.2d 704, 708 (5th Cir. 1973), *quoting* Humacid Co., 42 T.C. 894, 913 (1964).

- IRS will treat the proceeds as income to the donor "**only if the donee is legally bound, or can be compelled by the corporation, to surrender the shares for redemption**."[6]

Practically certain to occur

- Was the tax event "practically certain to occur" rather than the "mere anticipation or expectation" before the donation?[7]

Property turns into right to income

- Did property ownership change into a right to income in the property before the time of transfer?[8] To avoid being labeled a pre-arranged sale, the property cannot have been converted into a right to receive income by the time of transfer.

No obligation, no sale

- Was the Donee legally obligated, and compelled, to sell contributed property?[9] If no, that is a strong indication that the gift was not a pre-arranged sale.

Has right to income "crystallized"

- Had the redemption and the shareholder's corresponding right to income **"already been crystalized"** at the time of the gift?[10] If yes, then it can be treated as a pre-arranged sale.

[6] Rev. Rul. 78-197.
[7] Ferguson v. Commissioner, 174 F.3d 997 (9th Cir. 1999).
[8] Ferguson v. Commissioner, 174 F.3d 997 (9th Cir. 1999).
[9] Rauenhorst v. Commissioner, 119 T.C. 157 (2002).

[10] Dickinson v. Commissioner, T.C. Memo 2020-128.

NOTES

"INCOME INTEREST" DISTRIBUTIONS FROM CRTs

CHARITABLE REMAINDER TRUST IN GENERAL

This trust has been in the Internal Revenue Code since 1969. While it has had some revisions, it is essentially unchanged. The trust "splits" the interests in the asset(s) you contribute; (1) First there is an "income interest" paid to you or another individual (and in some cases to an entity), and (2) whatever remains in the trust after the income interest has expired (whether it lasts for one more lives or for a term of years not to exceed 20 years), that which remains in the trust is irrevocably dedicated to one or more charities, hence the name charitable "remainder" trust. What the charity receives is called "the remainder interest".

You can think of this split as the fruit (the income produced) and the tree (the assets ultimately going to charity that produced the fruit for you during the trust term).

CHOOSING YOUR TYPE OF CHARITABLE REMAINDER TRUST

☐ ANNUITY TRUST

Referred to as a CRAT (Charitable Remainder Annuity Trust), this trust pays a fixed dollar amount based on a percent you set in the trust instrument times the initial value of money OR assets transferred to the trust. You can make only one contribution. The annuity amount never changes, even though the trust asset value may increase or decrease.

2.1 Recipients. In each taxable year of the Trust, the Trustee shall pay an Annuity Amount to #1 NAME and #2 NAME (the "Recipients") in equal shares during their joint lifetimes, and after the death of one Recipient, wholly to the surviving Recipient, for his or her lifetime.

2.2 Annuity Amount. The Annuity Amount shall be equal to [NUMBER IN WORD FORM] percent ([NUMBER IN NUMERIC FORM] %) (the "Annuity Amount") of the net fair market value of the Trust assets valued as of the first business day of the first taxable year of the Trust (the "Valuation Date").

UNITRUST — 4 VARIATIONS

☐ STANDARD VERSION (SCRUT)

Referred to as a CRUT (Charitable Remainder Unitrust) or SCRUT (Standard Charitable Unitrust).This trust pays a fixed percentage times the yearly trust asset value, valued as of the first business day of the year. Therefore, the payout fluctuates with the asset values each year, but the distributions as determined at the beginning of each year are mandatory payments. Additional contributions are allowed.

2.1 Recipients. In each taxable year of the Trust, the Trustee shall pay a Unitrust Amount to NAME #1 and NAME #2 (the "Recipients") in equal shares during their joint lifetimes, and after the death of one Recipient, wholly to the surviving Recipient, for his or her lifetime.

2.2 Unitrust Amount. The Unitrust Amount shall be equal to [NUMBER IN WORD FORM] percent ([NUMBER IN NUMERIC FORM] %) of the net fair market value of the Trust assets valued as of the first business day of each taxable year of the Trust (the "Valuation Date").

☐ NET INCOME WITHOUT DEFICIENCY MAKE-UP

Referred to as a NICRUT, this trust pays the smaller of two amounts—the percentage you set in the trust document or the actual net income of the trust ("income" may be drafted to be only "ordinary income", such as dividends, interest, rents, royalties, annuities, or also to include realized net capital gains). If this trust pays less than the percentage stated in the trust, the trust does not pay back any prior year's deficiencies. Not many people choose this option as they prefer the NIMCRUT.

2.1 Recipients. In each taxable year of the Trust, the Trustee shall pay a Unitrust Amount to NAME #1 and NAME #2 (the "Recipients") in equal shares during their joint lifetimes, and after the death of one Recipient, wholly to the surviving Recipient, for his or her lifetime.

2.2 Unitrust Amount. The Unitrust Amount shall be equal to the lesser of (i) the Trust income for such taxable year (as defined in Section 643(b) of the Code and the regulations thereunder and Treasury Regulation Section ("Treas. Reg. sec") 1.664-3(a)(1)(i)(b)(3)) and (ii) [NUMBER IN WORD FORM] percent ([NUMBER IN NUMERIC FORM] %) (the "Fixed Percentage")

of the net fair market value of the Trust assets valued as of the first business day of each taxable year of the Trust (the "Valuation Date").

☐ NET INCOME UNITRUST WITH DEFICIENCY MAKE-UP

Referred to as a NIMCRUT, this trust is like the one just above with a major exception. The trust pays the smaller of two amounts—the percentage you set in the trust document or the actual net income of the trust ("income" may be drafted to be only "ordinary income", dividends, interest, rents, royalties, annuities, or also to include realized net capital gains). In years when the trust pays less than the percentage you set in the trust document, a "deficiency" is written in the books of account. If in later years the trust earns *more* than the percentage you set in the document, the trustee must pay back any deficiency up to the amount of earnings in that later year in excess of the fixed percentage amount. Thus, prior years' deficiencies may be able to be distributed with later years' excess earnings.

2.1 Recipients. In each taxable year of the Trust, the Trustee shall pay a Unitrust Amount to NAME #1 and NAME #2 (the "Recipients") in equal shares during their joint lifetimes, and after the death of one Recipient, wholly to the surviving Recipient, for his or her lifetime.

2.2 Unitrust Amount. The Unitrust Amount shall be equal to the lesser of (i) the Trust income for such taxable year (as defined in Section 643(b) of the Code and the regulations thereunder and Treasury Regulation Section ("Treas. Reg. sec") 1.664-3(a)(1)(i)(b)(3)) and (ii) [NUMBER IN WORD FORM] percent ([NUMBER IN NUMERIC FORM] %) (the "Fixed Percentage") of the net fair market value of the Trust assets valued as of the first business day of each taxable year of the Trust (the "Valuation Date").

2.3 Deficiency Amount; Deficiency Payable.

2.3 (a) Deficiency Amount. The aggregate of the Fixed Percentage amounts for all prior years, less the aggregate of the amounts paid to the Recipients for all prior years pursuant to Paragraphs 2.2 and 2.3 of this Article II, shall be the Deficiency Amount.

2.3 (b) Deficiency Payable. If there is a Deficiency Amount as described above in 2.3(a), then, in each taxable year of the Trust, the Trustee shall determine if any amount of the Deficiency Amount must be distributable ("Deficiency Payable"). The Deficiency Payable in any taxable year shall be equal to the lesser of the following two amounts:

(i) the amount by which the Trust income for the taxable year exceeds the Fixed Percentage amount for such taxable year; and

(ii) the Deficiency Amount in 2.3(a) computed as of the end of the taxable year in question.

If there is no excess Trust income over the Fixed Percentage in any taxable year, or if there is no Deficiency Amount as described in 2.3(a), there is no Deficiency Payable to be made.

2.3 (c) Payment to Recipients. In each taxable year in which there is a Deficiency Payable as described in 2.3(b), both the Deficiency Payable plus the Fixed Percentage amount for the taxable year shall be paid to the Recipients as the Unitrust Amount for such taxable year.

☐ FLIP UNITRUST OR FLIPCRUT (IRS NAME FOR IT IS CHANGE OF METHODS UNITRUST)

Referred to as a FlipCRUT, this trust starts out in its first phase as a net income with deficiency make-up NIMCRUT or as a NICRUT, and often holds illiquid assets such as real estate before the trustee sells the asset(s). Once the funding assets are sold or another stated "triggering event" happens, the trust moves into its second phase as an SCRUT with mandatory yearly payments based on the percentage set in the document and the yearly value of the assets. The second phase (the "Change of Methods") starts on January 1 the year following the triggering event (such as the sale of the illiquid assets). Other events can be the trigger for changing from a NIMCRUT to an SCRUT, such as a pre-set retirement age written into the document, a birthday date in the future, or a child or grandchild reaching a certain age, a marriage, a death, and other specific events. However, any event used as the triggering event must be beyond the control of the grantor or the trustee.

Phase 1—First Method, until Triggering event happens and then the Change of Method happens. Either NICRUT or NIMCRUT in First Phase.

2.1 Recipients. In each taxable year of the Trust, the Trustee shall pay a Unitrust Amount to NAME #1 and NAME #2 (the "Recipients") in equal shares during their joint lifetimes, and after the death of one Recipient, wholly to the surviving Recipient, for his or her lifetime.

2.2 Unitrust Amount. The Unitrust Amount shall be equal to the lesser of (i) the Trust income for such taxable year (as defined in Section 643(b) of the Code and the regulations thereunder and Treasury Regulation Section ("Treas. Reg. sec") 1.664-3(a)(1)(i)(b)(3)) and (ii) [NUMBER IN WORD FORM] percent ([NUMBER IN NUMERIC FORM] %) (the "Fixed Percentage")

of the net fair market value of the Trust assets valued as of the first business day of each taxable year of the Trust (the "Valuation Date").

2.3 Deficiency Amount; Deficiency Payable.

2.3 (a) Deficiency Amount. The aggregate of the Fixed Percentage amounts for all prior years, less the aggregate of the amounts paid to the Recipients for all prior years pursuant to Paragraphs 2.2 and 2.3 of this Article II, shall be the Deficiency Amount.

2.3 (b) Deficiency Payable. If there is a Deficiency Amount as described above in 2.3(a), then, in each taxable year of the Trust, the Trustee shall determine if any amount of the Deficiency Amount must be distributable ("Deficiency Payable"). The Deficiency Payable in any taxable year shall be equal to the lesser of the following two amounts:

(i) the amount by which the Trust income for the taxable year exceeds the Fixed Percentage amount for such taxable year; and

(ii) the Deficiency Amount in 2.3(a) computed as of the end of the taxable year in question.

If there is no excess Trust income over the Fixed Percentage in any taxable year, or if there is no Deficiency Amount as described in 2.3(a), there is no Deficiency Payable to be made.

2.3 (c) Payment to Recipients. In each taxable year in which there is a Deficiency Payable as described in 2.3(b), both the Deficiency Payable plus the Fixed Percentage amount for the taxable year shall be paid to the Recipients as the Unitrust Amount for such taxable year.

2.4 Change of Method. The method of payment from this Trust shall be changed from the method provided in Paragraph 2.2 to a payment based solely on the Fixed Percentage as defined in Paragraph 2.2 (the "Change of Method"), which change shall be caused by the happening of a triggering event as defined in Treas. Reg. Sec. 1.664-3(a)(1)(i)(c) and (d).

2.4 (a) Triggering Event. The triggering event to cause the Change of Method of payment from this Trust to the Recipient(s) shall be [THE SALE OF UNMARKETABLE ASSETS AS DEFINED IN PARAGRAPH 4.3(a) WITH WHICH THIS TRUST WAS INITIALLY FUNDED AS INDICATED ON SCHEDULE A] OR [STATE OTHER TRIGGERING EVENT, SUCH AS A SPECIFIC DATE] ("Triggering Event").

2.4 (b) Prior to the Change of Method. Prior to the Change of Method, the Trustee shall pay the amounts set forth in Paragraphs 2.2 and 2.3 to the Recipient(s).

2.4 (c) After the Change of Method. After the Change of Method, the Trustee shall pay to the Recipient(s) solely the Fixed Percentage stated in Paragraph 2.2, beginning with the first taxable year following the year in which the Triggering Event occurs, and continuing until the end of the Trust Term.

2.4 (d) Payments in Accordance with Paragraph 2.5 (b). Notwithstanding anything to the contrary herein, the Fixed Percentage payments required under this Paragraph 2.4 following the Change of Method shall be paid in accordance with the provisions of Paragraph 2.5 (b). Other than the Change of Method of payment authorized by this Article and Treas. Reg. sec. 1.664-3(a)(1)(i)(c), all other terms of this Trust remain unchanged.

2.5 Frequency of Payments.

2.5 (a) Prior to Change of Method. The Unitrust Amount to be paid under Paragraph 2.2 for the taxable year shall be paid at the end of each [MONTH/ QUARTER/ SIX MONTHS IN APPROXIMATELY EQUAL INSTALLMENTS] [YEAR] from income, or as necessary, after the close of the taxable year if made within a reasonable time. In any taxable year in which the Unitrust Amount includes a Deficiency Payable as defined in Paragraph 2.3(b), the Deficiency Payable shall be paid upon the Trustee's determination of the amount due for such taxable year and shall be paid within a reasonable time after the close of the year. "Reasonable time" shall be as defined in Treas. Reg. sec 1.664-3(a)(1)(i)(k) and shall not ordinarily extend beyond the date required to file Form 5227, including extensions. Any income of the Trust for a taxable year in excess of the Unitrust Amount

(Fixed Percentage amount plus Deficiency Payable) shall be added to principal.

2.5 (b) After the Change of Method. After the Change of Method described in Paragraph 2.4, solely the Fixed Percentage amount under Paragraph 2.2 shall be paid as the Unitrust Amount for each taxable year thereafter and shall be paid at the end of each [MONTH, QUARTER, SIX MONTHS,—MUST BE THE SAME AS IN 2.6(a) ABOVE--IN EQUAL INSTALLMENTS] [YEAR], from income and to the extent that income is not sufficient, from principal. Such Unitrust Amount shall be paid no later than the close of the taxable year of the Trust for which the payment is due, unless the payment is made within a reasonable time after the close of the taxable year and is characterized in Section 664(b)(1), (2) or (3) of the Code. If the Unitrust Amount is characterized as paid from corpus, the Unitrust Amount may be characterized as corpus only if (i) the payment is made from property (other than cash) owned by this Trust at the close of the taxable year and the Trustee elects to treat any income generated by the payment as occurring on the last day of the taxable year in which the Unitrust Amount is due, (ii) the Trust pays the Unitrust Amount from cash contributed to the Trust, or (iii) the Trust pays the Unitrust Amount from cash received as return of basis of an asset contributed to the Trust and sold by the Trust during the year in which the Unitrust Amount is due. Any income of the Trust for a taxable year in excess of the Unitrust Amount shall be added to principal.

Phase 2—Second Method

*[Then a specific **date** or a specific **event** occurs. The next January 1, the Second Method starts for the remaining duration of the trust.]*

2.1 Recipients. In each taxable year of the Trust, the Trustee shall pay a Unitrust Amount to NAME #1 and NAME #2 (the "Recipients") in equal

shares during their joint lifetimes, and after the death of one Recipient, wholly to the surviving Recipient, for his or her lifetime.

*[The trust then changes from FlipCRUT to **STANDARD VERSION (SCRUT)** as described above. It "FLIPS" from one type of CRT to another type of CRT.]*

2.2 Unitrust Amount. The Unitrust Amount shall be equal to [NUMBER IN WORD FORM] percent ([NUMBER IN NUMERIC FORM] %) of the net fair market value of the Trust assets valued as of the first business day of each taxable year of the Trust (the "Valuation Date").

WHAT HAPPENS TO ADDITIONAL CONTRIBUTIONS FOR THE CRAT AND THE CRUT VARIATIONS?

ARTICLE FIVE IN THIS TEMPLATE:

CRAT—

5.1 Additional Contributions.

No additional contributions may be made to this Trust after the initial contribution.

SCRUT—

5.1.2 Additional Contributions; Payments. Notwithstanding Paragraph 2.2, if any additional contributions are made to the Trust after the initial contribution, the Unitrust Amount for the year in which the additional contribution is made shall be equal to the lesser of a Fixed Percentage amount equal to [NUMBER IN WORD FORM] percent ([NUMBER IN NUMERIC FORM] %) {*MUST BE SAME PERCENT AS IN ARTICLE II] SAME PERCENT AS IN ARTICLE II*}of the sum of:

(i) the net fair market value of the Trust assets as of the Valuation Date (excluding the assets so added and any post-

contribution income from and appreciation on such assets during that year); and

(ii) for each additional contribution during the year, the fair market value of the assets added as of the Valuation Date for Additional Contributions (excluding any post-contribution income from and appreciation on such assets during that year)

multiplied by a fraction the numerator of which is the number of days in the period that begins with the date of contribution and ends with the earlier of the last day of the taxable year or the last day of the unitrust period and the denominator of which is the number of days in the period that begins with the first day of such taxable year and ends with the earlier of the last day in such taxable year or the last day of the unitrust period.

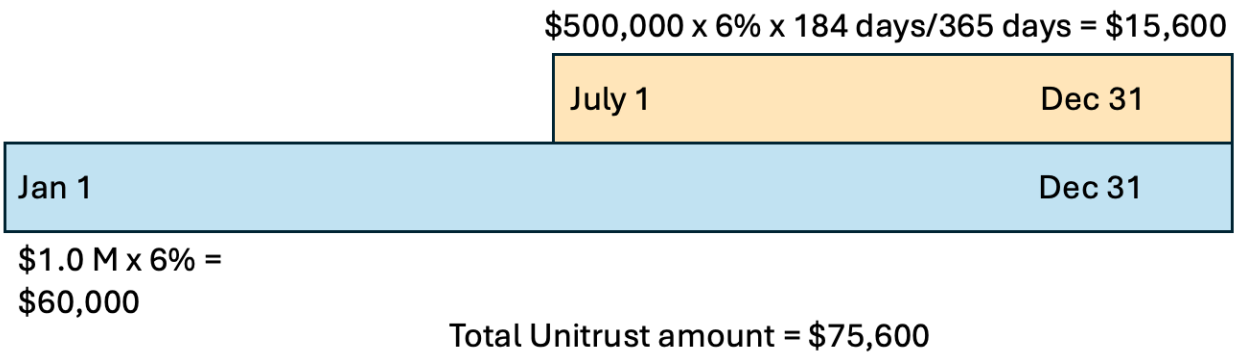
IN OTHER WORDS—

Unitrust % x Sum of following —

Net FMV of assets, excluding the additional contribution, its income and its appreciation

Plus

Value of additional contribution X $\frac{\text{\# Days from date of property to year-end or end of unitrust payments}}{\text{\# Days from 1st day of year to year end or end of unitrust payments}}$



NICRUT—

5.1.2 Additional Contributions; Payments. Notwithstanding Paragraph 2.2, if any additional contributions are made to the Trust after the initial contribution, the Unitrust Amount for the year in which the additional contribution is made shall be equal to the lesser of:

(a) a Fixed Percentage amount equal to [NUMBER IN WORD FORM] percent ([NUMBER IN NUMERIC FORM] %) {*MUST BE SAME PERCENT AS IN ARTICLE II] SAME PERCENT AS IN ARTICLE II*}of the sum of:

(i) the net fair market value of the Trust assets as of the Valuation Date (excluding the assets so added and any post-contribution income from and appreciation on such assets during that year); and

(ii) for each additional contribution during the year, the fair market value of the assets added as of the Valuation Date for Additional Contributions (excluding any post-contribution income from and appreciation on such assets during that year)

multiplied by a fraction the numerator of which is the number of days in the period that begins with the date of contribution and ends with the earlier of the last day of the taxable year or the last day of the unitrust period and the

denominator of which is the number of days in the period that begins with the first day of such taxable year and ends with the earlier of the last day in such taxable year or the last day of the unitrust period (hereinafter "the Fixed Percentage amount described in (a) of paragraph 5.1.1"); and

(b) the Trust income for the taxable year (as defined in Section 643(b) of the Code and the regulations thereunder and Treasury Regulation Section ("Treas. Reg. Sec") 1.664-3(a)(1)(i)(b)(3)) as set forth in Paragraph 2.2.

NIMCRUT—

5.1.2 Additional Contributions; Payments. Notwithstanding Paragraph 2.2, if any additional contributions are made to the Trust after the initial contribution, the Unitrust Amount for the year in which the additional contribution is made shall be equal to the lesser of:

(a) a Fixed Percentage amount equal to [NUMBER IN WORD FORM] percent ([NUMBER IN NUMERIC FORM] %) {*MUST BE SAME PERCENT AS IN ARTICLE II] SAME PERCENT AS IN ARTICLE II*}of the sum of:

(i) the net fair market value of the Trust assets as of the Valuation Date (excluding the assets so added and any post-contribution income from and appreciation on such assets during that year); and

(ii) for each additional contribution during the year, the fair market value of the assets added as of the Valuation Date for Additional Contributions (excluding any post-contribution income from and appreciation on such assets during that year)

multiplied by a fraction the numerator of which is the number of days in the period that begins with the date of contribution and ends with the earlier of the last day of the taxable year or the last day of the unitrust period and the

denominator of which is the number of days in the period that begins with the first day of such taxable year and ends with the earlier of the last day in such taxable year or the last day of the unitrust period (hereinafter "the Fixed Percentage amount described in (a) of paragraph 5.1.1"); and

(b) the Trust income for the taxable year (as defined in Section 643(b) of the Code and the regulations thereunder and Treasury Regulation Section ("Treas. Reg. Sec") 1.664-3(a)(1)(i)(b)(3)) as set forth in Paragraph 2.2.

The terms and provisions of Paragraph 2.3 shall remain applicable.

FlipCRUT—

5.1.1 Before Effective Date of Change of Method. Notwithstanding Paragraph 2.2, if any additional contributions are made to the Trust after the initial contribution and before the effective date of the Change of Method, the Unitrust Amount for the year in which the additional contribution is made shall be equal to the lesser of:

(a) a Fixed Percentage amount equal to [NUMBER IN WORD FORM] percent ([NUMBER IN NUMERIC FORM] %) {*MUST BE SAME PERCENT AS IN ARTICLE II] SAME PERCENT AS IN ARTICLE II*}of the sum of:

(i) the net fair market value of the Trust assets as of the Valuation Date (excluding the assets so added and any post-contribution income from and appreciation on such assets during that year); and

(ii) for each additional contribution during the year, the fair market value of the assets added as of the Valuation Date for Additional Contributions (excluding any post-contribution income from and appreciation on such assets during that year)

multiplied by a fraction the numerator of which is the number of days in the

period that begins with the date of contribution and ends with the earlier of the last day of the taxable year or the last day of the unitrust period and the denominator of which is the number of days in the period that begins with the first day of such taxable year and ends with the earlier of the last day in such taxable year or the last day of the unitrust period (hereinafter "the Fixed Percentage amount described in (a) of paragraph 5.1.1"); and

(b) the Trust income for the taxable year (as defined in Section 643(b) of the Code and the regulations thereunder and Treasury Regulation Section ("Treas. Reg. Sec") 1.664-3(a)(1)(i)(b)(3)) as set forth in Paragraph 2.2.

The terms and provisions of Paragraph 2.3 shall remain applicable.

5.1.2 On or After Effective Date of Change of Method. If any additional contributions are made to the Trust after the initial contribution and on or after the effective date of the Change of Method, the Fixed Percentage described in Paragraph 2.2 for the year in which the additional contribution is made shall be [NUMBER IN WORD FORM] percent ([NUMBER IN NUMERIC FORM] %) {*MUST BE SAME PERCENT AS IN ARTICLE II] SAME PERCENT AS IN ARTICLE II*}of the sum of:

(i) the net fair market value of the Trust assets as of the Valuation Date (excluding the assets so added and any post-contribution income from, and appreciation on, such assets during that year); and

(ii) for each additional contribution during the year, the fair market value of the assets so added as of the Valuation Date for Additional Contributions (excluding any post-contribution income from, and appreciation on, such assets),

multiplied by a fraction the numerator of which is the number of days in the period that begins with the date of contribution and ends with the earlier of the last day of the taxable year or the last day of the unitrust period and the

denominator of which is the number of days in the period that begins with the first day of such taxable year and ends with the earlier of the last day in such taxable year or the last day of the unitrust period.

NOW LET'S LOOK AT THE WHOLE TRUST

EXHIBIT 7b

COMBINED INTERVIVOS TEMPLATE BASED ON TWO SETTLORS, TWO LIVES FlipCRUT
Revised 6-2-2024

SAVE AS BEFORE USING

REMEMBER TO REMOVE ALL INSTRUCTIONS AND HEADER

[NAME] CHARITABLE REMAINDER TRUST

OPTION #1-IF SETTLORS ARE ALSO TRUSTEES

THIS TRUST AGREEMENT (the "Agreement") is entered into by [SETTLOR #1 NAME] and [SETTLOR #2 NAME] of [CITY, STATE] (hereinafter referred to as the "Settlors" or the “Trustees” or “Trustee” as the context may require). The Settlors desire to establish a charitable remainder unitrust within the meaning of Rev. Proc. 2005-55

[FOR REV. PROC. CITE CHOOSE: 2005-55 FOR JOINT AND SURVIVOR, 2005-54 FOR CONSECUTIVE LIVES, 2005-53 FOR TERM OF YEARS, OR 2005-52 FOR ONE LIFE]

and Section

[FOR CODE CITE CHOOSE: 664(d)(1) FOR CRAT, 664(d)(2) FOR SCRUT, 664(d)(2) and (3) FOR NICRUT, NIMCRUT OR FLIPCRUT]

of the Internal Revenue Code of 1986 as amended (hereinafter referred to as the "Code") and hereby create the [NAME] CHARITABLE REMAINDER TRUST (the “Trust”), which shall be held for the following uses and purposes:

OPTION #2—IF SETTLORS ARE NOT, OR NEITHER IS, TRUSTEE

_____ INITIAL

_____ INITIAL

COMBINED INTERVIVOS TEMPLATE BASED ON TWO SETTLORS, TWO LIVES FlipCRUT
Revised 6-2-2024

THIS TRUST AGREEMENT (the "Agreement") is entered into by and between [SETTLOR #1 NAME] [SETTLOR #2 NAME] of [CITY, STATE] (hereinafter referred to as the "Settlors") and [NAME OF TRUSTEE] (hereinafter referred to as the "Trustee"). The Settlors desire to establish a charitable remainder unitrust within the meaning of Rev. Proc. 2005-55

[FOR REV. PROC. CITE CHOOSE: 2005-55 FOR JOINT AND SURVIVOR, 2005-54 FOR CONSECUTIVE LIVES, 2005-53 FOR TERM OF YEARS, OR 2005-52 FOR ONE LIFE]

and Section

[FOR CODE CITE CHOOSE: 664(d)(1) FOR CRAT, 664(d)(2) FOR SCRUT, 664(D)(2) and (3) FOR NICRUT, NIMCRUT OR FLIPCRUT]

of the Internal Revenue Code of 1986 as amended (hereinafter referred to as the "Code") and hereby create the [NAME] CHARITABLE REMAINDER TRUST (the "Trust"), which shall be held for the following uses and purposes:

ARTICLE I

Funding of Trust

1.1 The Trust Estate. The Settlors hereby transfer to the Trustee the property described in Schedule A attached hereto and made part hereof, and all property which may be added to the Trust at any time (the "Trust Estate"), to hold, administer, manage, and distribute in accordance with the terms of this Agreement. The Trustee shall have the power to collect and receive the income of the Trust Estate, to pay all lawful charges and

_____ INITIAL

_____ INITIAL

other expenses properly incident to the management of this Trust, and to engage agents to carry out the management of this Trust.

1.2 Taxable Year. The taxable year of the Trust shall be the calendar year.

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_____ INITIAL

_____ INITIAL

COMBINED INTERVIVOS TEMPLATE BASED ON TWO SETTLORS, TWO LIVES FlipCRUT
Revised 6-2-2024

ARTICLE II

Payment of Unitrust Amount

OPTION #1 - TWO RECIPIENTS, JOINT AND SURVIVOR LIVES

2.1 Recipients; Trust Term. In each taxable year of the Trust, the Trustee shall pay a Unitrust Amount to [RECIPIENT #1 NAME] and [RECIPIENT #2 NAME] (the "Recipients") [IN EQUAL SHARES] [JOINTLY] during their joint lifetimes, and after the death of one Recipient, wholly to the surviving Recipient, for his or her lifetime. (the "Trust Term"). The first day of the obligation to pay the Unitrust Amount shall commence with the date property is transferred to the Trust as indicated by Trustee's acceptance on Schedule A.

OPTION #2 – TWO RECIPIENTS, CONSECUTIVE LIVES

2.1 Recipients; Trust Term. In each taxable year of the Trust, the Trustee shall pay a Unitrust Amount to [INITIAL RECIPIENT NAME] ("the Initial Recipient") until the Initial Recipient's death, and thereafter to [SURVIVOR RECIPIENT NAME] ("the Successor Recipient") if [HE/SHE] survives the Initial Recipient, for his or her lifetime (the "Trust Term"). The first day of the obligation to pay the Unitrust Amount shall commence with the date property is transferred to the Trust as indicated by Trustee's acceptance on Schedule A.

COMBINED INTERVIVOS TEMPLATE BASED ON TWO SETTLORS, TWO LIVES FlipCRUT
Revised 6-2-2024

OPTION #3 - TWO RECIPIENTS, DISCRETIONARY PAYMENTS BY INDEPENDENT TRUSTEE

2.1 Recipients; Trust Term. In each taxable year of the Trust during their joint lifetimes, the Trustee shall pay a Unitrust Amount to [RECIPIENT #1 NAME] and [RECIPIENT #2 NAME] (the "Recipients") in such proportions as the Trustee in its absolute discretion determines in the taxable year, and after the death of the first Recipient to die, wholly for the lifetime of the surviving Recipient (the "Trust Term"). The first day of the obligation to pay the Unitrust Amount shall commence with the date property is transferred to the Trust as indicated by Trustee's acceptance on Schedule A.

OPTION #4 - TWO RECIPIENTS, TERM OF YEARS TRUST

2.1 Recipients; Trust Term. In each taxable year of the Trust, the Trustee shall pay a Unitrust Amount to [RECIPIENT NAME #1] and [RECIPIENT NAME #2] (the "Recipients") for a term of [NUMBER OF YEARS] years, ([NUMBER STATED IN MONTHS] months), (the "[NUMBER STATED IN YEARS] Year Trust Term") from the date property is first transferred to the Trust as indicated by the acceptance of property by the Trustee on Schedule A attached hereto and made part hereof, and the last day of the [NUMBER IN WORD FORM] Year Trust Term, which shall be the day preceding the [ORDINAL NUMBER OF YEARS IN TRUST TERM IN WORD FORM—E.G. TWENTIETH] anniversary of the date of first transfer, or until the date of death of the last surviving Recipient, if that occurs sooner than the expiration of [NUMBER OF YEARS IN WORD FORM] years.

_____ INITIAL

_____ INITIAL

COMBINED INTERVIVOS TEMPLATE BASED ON TWO SETTLORS, TWO LIVES FlipCRUT
Revised 6-2-2024

OPTION #5 - TERM OF YEARS TRUST FOR CLASS OF BENEFICIARIES

2.1 Recipients; Trust Term. In each taxable year of the Trust, the Trustee shall pay a Unitrust Amount to a member or members of a class of persons comprised of the [*e.g.grandchildren*] of the Settlors (hereinafter collectively "the Recipients") for a term of [NUMBER OF YEARS] years, ([NUMBER STATED IN MONTHS] months), (the "[NUMBER STATED IN YEARS] Year Trust Term") from the date property is first transferred to the Trust as indicated by the acceptance of property by the Trustee on Schedule A attached hereto and made part hereof, and the last day of the [NUMBER IN WORD FORM] Year Trust Term, which shall be the day preceding the [ORDINAL NUMBER OF YEARS IN TRUST TERM IN WORD FORM—E.G. TWENTIETH] anniversary of the date of first transfer, or until the date of death of the last surviving Recipient, if that occurs sooner than the expiration of the [NUMBER IN WORD FORM] years. The Trustee may pay the unitrust amount to one or more members of the class, in equal or unequal shares, as the Trustee, in the Trustee's sole discretion, from time to time may deem advisable. The Trustee may not, however, apply any payment for the Trustee's own benefit, or in satisfaction of any support or other legal obligation of the Trustee.
[NOTE: ***THIS ABOVE OPTION REQUIRES AN INDEPENDENT TRUSTEE]***

CHOICE OF UNITRUST AMOUNT FOR:
FLIPCRUT

2.2 Unitrust Amount. The Unitrust Amount shall be equal to the lesser of (i) the Trust income for such taxable year (as defined in Section 643(b) of the Code and the regulations thereunder and Treasury Regulation Section ("Treas. Reg. sec") 1.664-3(a)(1)(i)(b)(3)) and (ii) [NUMBER IN WORD FORM] percent ([NUMBER IN NUMERIC FORM] %) (the "Fixed Percentage") of the net fair market value of the Trust

_____ INITIAL
_____ INITIAL

assets valued as of the first business day of each taxable year of the Trust (the "Valuation Date").

2.3 Deficiency Amount; Deficiency Payable.

2.3 (a) Deficiency Amount. The aggregate of the Fixed Percentage amounts for all prior years, less the aggregate of the amounts paid to the Recipients for all prior years pursuant to Paragraphs 2.2 and 2.3 of this Article II, shall be the Deficiency Amount.

2.3 (b) Deficiency Payable. If there is a Deficiency Amount as described above in 2.3(a), then, in each taxable year of the Trust, the Trustee shall determine if any amount of the Deficiency Amount must be distributable ("Deficiency Payable"). The Deficiency Payable in any taxable year shall be equal to the lesser of the following two amounts:

(i) the amount by which the Trust income for the taxable year exceeds the Fixed Percentage amount for such taxable year; and

(ii) the Deficiency Amount in 2.3(a) computed as of the end of the taxable year in question.

If there is no excess Trust income over the Fixed Percentage in any taxable year, or if there is no Deficiency Amount as described in 2.3(a), there is no Deficiency Payable to be made.

2.3 (c) Payment to Recipients. In each taxable year in which there is a Deficiency Payable as described in 2.3(b), both the Deficiency Payable plus the Fixed Percentage amount for the taxable year shall be paid to the Recipients as the Unitrust Amount for such taxable year.

2.3 (d) Excess Income. Any income of the Trust for a taxable year in excess of the Unitrust Amount as defined in this Article II shall be added to principal.

2.4 Change of Method. The method of payment from this Trust shall be changed from the method provided in Paragraph 2.2 to a payment based solely on the Fixed Percentage as defined in Paragraph 2.2 (the "Change of Method"), which change

_____ INITIAL

_____ INITIAL

shall be caused by the happening of a triggering event as defined in Treas. Reg. sec. 1.664-3(a)(1)(i)(c) and (d).

2.4 (a) Triggering Event. The triggering event to cause the Change of Method of payment from this Trust to the Recipient(s) shall be [THE SALE OF UNMARKETABLE ASSETS AS DEFINED IN PARAGRAPH 4.3.1 WITH WHICH THIS TRUST WAS INITIALLY FUNDED AS INDICATED ON SCHEDULE A] OR [STATE OTHER TRIGGERING EVENT, SUCH AS A SPECIFIC DATE] ("Triggering Event").

2.4 (b) Prior to the Change of Method. Prior to the Change of Method, the Trustee shall pay the amounts set forth in Paragraphs 2.2 and 2.3 to the Recipient(s).

2.4 (c) After the Change of Method. After the Change of Method, the Trustee shall pay to the Recipient(s) solely the Fixed Percentage stated in Paragraph 2.2, beginning with the first taxable year following the year in which the Triggering Event occurs, and continuing until the end of the Trust Term.

2.4 (d) Payments in Accordance with Paragraph 2.5 (b). Notwithstanding anything to the contrary herein, the Fixed Percentage payments required under this Paragraph 2.4 following the Change of Method shall be paid in accordance with the provisions of Paragraph 2.5 (b). Other than the Change of Method of payment authorized by this Article and Treas. Reg. sec. 1.664-3(a)(1)(i)(c), all other terms of this Trust remain unchanged.

2.5 Frequency of Payments.

2.5 (a) Prior to Change of Method. The Unitrust Amount to be paid under Paragraph 2.2 for the taxable year shall be paid at the end of each [MONTH/ QUARTER/ SIX MONTHS IN APPROXIMATELY EQUAL INSTALLMENTS] [YEAR] from income, or as necessary, after the close of the taxable year if made within a reasonable time. In any taxable year in which the Unitrust Amount includes a Deficiency Payable as defined in Paragraph 2.3(b), the Deficiency Payable shall be paid upon the Trustee's determination of the amount due for such taxable year and shall be paid within a

reasonable time after the close of the year. "Reasonable time" shall be as defined in Treas. Reg. sec 1.664-3(a)(1)(i)(k) and shall not ordinarily extend beyond the date required to file Form 5227, including extensions. Any income of the Trust for a taxable year in excess of the Unitrust Amount (Fixed Percentage amount plus Deficiency Payable) shall be added to principal.

2.5 (b) After the Change of Method. After the Change of Method described in Paragraph 2.4, solely the Fixed Percentage amount under Paragraph 2.2 shall be paid as the Unitrust Amount for each taxable year thereafter and shall be paid at the end of each [MONTH, QUARTER, SIX MONTHS,—MUST BE THE SAME AS IN 2.6(a) ABOVE--IN EQUAL INSTALLMENTS] [YEAR], from income and to the extent that income is not sufficient, from principal. Such Unitrust Amount shall be paid no later than the close of the taxable year of the Trust for which the payment is due, unless the payment is made within a reasonable time after the close of the taxable year and is characterized in Section 664(b)(1), (2) or (3) of the Code. If the Unitrust Amount is characterized as paid from corpus, the Unitrust Amount may be characterized as corpus only if (i) the payment is made from property (other than cash) owned by this Trust at the close of the taxable year and the Trustee elects to treat any income generated by the payment as occurring on the last day of the taxable year in which the Unitrust Amount is due, (ii) the Trust pays the Unitrust Amount from cash contributed to the Trust, or (iii) the Trust pays the Unitrust Amount from cash received as return of basis of an asset contributed to the Trust and sold by the Trust during the year in which the Unitrust Amount is due. Any income of the Trust for a taxable year in excess of the Unitrust Amount shall be added to principal.

2.6 Proration. In determining the amounts to be paid under this Article II, and any amounts that may be paid based on the additional contributions calculation as described in Article V, the Trustee shall prorate the same on a daily basis for a short taxable year in accordance with Treas. Reg. sec. 1.664-3(a)(1)(v)(a) and for the taxable

year in which the noncharitable interests terminate in accordance with Treas. Reg. sec. 1.664-3(a)(1)(v)(b).

CHOICE OF UNITRUST AMOUNT FOR NIMCRUT

2.2 Unitrust Amount. The Unitrust Amount shall be equal to the lesser of (i) the Trust income for such taxable year (as defined in Section 643(b) of the Code and the regulations thereunder and Treasury Regulation Section ("Treas. Reg. sec") 1.664-3(a)(1)(i)(b)(3)) and (ii) [NUMBER IN WORD FORM] percent ([NUMBER IN NUMERIC FORM] %) (the "Fixed Percentage") of the net fair market value of the Trust assets valued as of the first business day of each taxable year of the Trust (the "Valuation Date").

2.3 Deficiency Amount; Deficiency Payable.

2.3 (a) Deficiency Amount. The aggregate of the Fixed Percentage amounts for all prior years, less the aggregate of the amounts paid to the Recipients for all prior years pursuant to Paragraphs 2.2 and 2.3 of this Article II, shall be the Deficiency Amount.

2.3 (b) Deficiency Payable. If there is a Deficiency Amount as described above in 2.3(a), then, in each taxable year of the Trust, the Trustee shall determine if any amount of the Deficiency Amount must be distributable ("Deficiency Payable"). The Deficiency Payable in any taxable year shall be equal to the lesser of the following two amounts:

(i) the amount by which the Trust income for the taxable year exceeds the Fixed Percentage amount for such taxable year; and

(ii) the Deficiency Amount in 2.3(a) computed as of the end of the taxable year in question.

If there is no excess Trust income over the Fixed Percentage in any taxable year, or if there is no Deficiency Amount as described in 2.3(a), there is no Deficiency Payable to be made.

2.3 (c) Payment to Recipients. In each taxable year in which there is a Deficiency Payable as described in 2.3(b), both the Deficiency Payable plus the Fixed Percentage amount for the taxable year shall be paid to the Recipients as the Unitrust Amount for such taxable year.

2.3 (d) Excess Income. Any income of the Trust for a taxable year in excess of the Unitrust Amount as defined in this Article II shall be added to principal.

2.4 Frequency of Payments. The Unitrust Amount to be paid under Paragraph 2.2 for the taxable year shall be paid at the end of each [MONTH/ QUARTER/ SIX MONTHS IN APPROXIMATELY EQUAL INSTALLMENTS] [YEAR] from income, or as necessary, after the close of the taxable year if made within a reasonable time. In any taxable year in which the Unitrust Amount includes a Deficiency Payable as defined in Paragraph 2.3(b), the Deficiency Payable shall be paid upon the Trustee's determination of the amount due for such taxable year and shall be paid within a reasonable time after the close of the year. "Reasonable time" shall be as defined in Treas. Reg. sec 1.664-3(a)(1)(i)(k) and shall not ordinarily extend beyond the date required to file Form 5227, including extensions. Any income of the Trust for a taxable year in excess of the Unitrust Amount (Fixed Percentage amount plus Deficiency Payable) shall be added to principal.

2.5 Proration. In determining the amounts to be paid under this Article II, and any amounts that may be paid based on the additional contributions calculation as described in Article V, the Trustee shall prorate the same on a daily basis for a short taxable year in accordance with Treas. Reg. sec. 1.664-3(a)(1)(v)(a) and for the taxable year in which the noncharitable interests terminate in accordance with Treas. Reg. sec. 1.664-3(a)(1)(v)(b).

COMBINED INTERVIVOS TEMPLATE BASED ON TWO SETTLORS, TWO LIVES FlipCRUT
Revised 6-2-2024

CHOICE OF UNITRUST AMOUNT FOR

NICRUT

2.2 Unitrust Amount. The Unitrust Amount shall be equal to the lesser of (i) the Trust income for such taxable year (as defined in Section 643(b) of the Code and the regulations thereunder and Treasury Regulation Section ("Treas. Reg. sec") 1.664-3(a)(1)(i)(b)(3)) and (ii) [NUMBER IN WORD FORM] percent ([NUMBER IN NUMERIC FORM] %) (the "Fixed Percentage") of the net fair market value of the Trust assets valued as of the first business day of each taxable year of the Trust (the "Valuation Date").

2.3 Excess Income. Any income of the Trust for a taxable year in excess of the Unitrust Amount as defined in this Article II shall be added to principal.

2.4 Frequency of Payments. The Unitrust Amount to be paid under Paragraph 2.2 for the taxable year shall be paid at the end of each [MONTH/ QUARTER/ SIX MONTHS IN APPROXIMATELY EQUAL INSTALLMENTS] [YEAR] from income, or as necessary, after the close of the taxable year if made within a reasonable time. "Reasonable time" shall be as defined in Treas. Reg. sec 1.664-3(a)(1)(i)(k) and shall not ordinarily extend beyond the date required to file Form 5227, including extensions. Any income of the Trust for a taxable year in excess of the Unitrust Amount (Fixed Percentage amount plus Deficiency Payable) shall be added to principal.

2.5 Proration. In determining the amounts to be paid under this Article II, and any amounts that may be paid based on the additional contributions calculation as described in Article V, the Trustee shall prorate the same on a daily basis for a short taxable year in accordance with Treas. Reg. sec. 1.664-3(a)(1)(v)(a) and for the taxable year in which the noncharitable interests terminate in accordance with Treas. Reg. sec. 1.664-3(a)(1)(v)(b).

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CHOICE OF UNITRUST AMOUNT FOR SCRUT

2.2 Unitrust Amount. The Unitrust Amount shall be equal to [NUMBER IN WORD FORM] percent ([NUMBER IN NUMERIC FORM] %) (the "Fixed Percentage") of the net fair market value of the Trust assets valued as of the first business day of each taxable year of the Trust (the "Valuation Date").

2.3 Excess Income. Any income of the Trust for a taxable year in excess of the Unitrust Amount as defined in this Article II shall be added to principal.

2.4 Frequency of Payments. The Unitrust Amount to be paid under Paragraph 2.2 for the taxable year shall be paid at the end of each [MONTH/ QUARTER/ SIX MONTHS IN EQUAL INSTALLMENTS] [YEAR] from income, and to the extent that income is not sufficient, from principal, or as necessary, after the close of the taxable year if made within a reasonable time. “Reasonable time” shall be as defined in Treas. Reg. sec 1.664-3(a)(1)(i)(k) and shall not ordinarily extend beyond the date required to file Form 5227, including extensions.

2.5 Proration. In determining the amounts to be paid under this Article II, and any amounts that may be paid based on the additional contributions calculation as described in Article V, the Trustee shall prorate the same on a daily basis for a short taxable year in accordance with Treas. Reg. sec. 1.664-3(a)(1)(v)(a) and for the taxable year in which the noncharitable interests terminate in accordance with Treas. Reg. sec. 1.664-3(a)(1)(v)(b).

CHOICE FOR CRAT ANNUITY AMOUNT—PLEASE REFER TO ADDENDUM FOR SEVERAL OTHER CHANGES FOR CRATS

2.2 Annuity Amount. The Annuity Amount shall be equal to [NUMBER IN WORD FORM] percent ([NUMBER IN NUMERIC FORM] %) (the "Annuity Amount")

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of the net fair market value of the Trust assets valued as of the first business day of the initial taxable year of the Trust (the "Valuation Date").

2.3 Excess Income. Any income of the Trust for a taxable year in excess of the Annuity Amount as defined in this Article II shall be added to principal.

2.4 Frequency of Payments. The Annuity Amount to be paid under Paragraph 2.2 for the taxable year shall be paid at the end of each [MONTH/ QUARTER/ SIX MONTHS IN EQUAL INSTALLMENTS] [YEAR] from income, and to the extent that income is not sufficient, from principal, or as necessary, after the close of the taxable year if made within a reasonable time. "Reasonable time" shall be as defined in Treas. Reg. sec 1.664-3(a)(1)(i)(k) and shall not ordinarily extend beyond the date required to file Form 5227, including extensions.

2.5 Proration. In determining the amounts to be paid under this Article II, the Trustee shall prorate the same on a daily basis for a short taxable year in accordance with Treas. Reg. sec. 1.664-2(a)(1)(iv)(a) and for the taxable year in which the noncharitable interests terminate in accordance with Treas. Reg. sec. 1.664-2(a)(1)(iv)(b).

RENUMBER NEXT OPTIONAL PARAGRAPH FOR UNITRUST OR ANNUITY DISTRIBUTION

[*2.X Amount After Early Distribution to Charity AND 3.X* [UNITRUST] [ANNUITY] *Amount After Early Distribution to Charity.. ARE OPTIONAL PROVISIONS AND GO TOGETHER--FILL IN CORRECT PARAGRAPH #]*

FOR UNITRUST-

2.X Unitrust Amount After Early Distribution to Charity. After any distribution pursuant to Article III, Paragraph 3.X payment of the Unitrust Amount referred to in this Article II shall be calculated based on the remaining net fair market value of the Trust assets as of the next succeeding Valuation Date.

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FOR ANNUITY TRUST-

2.X Annuity Amount After Early Distribution to Charity. After any distribution pursuant to Article III, Paragraph 3.X payment of the Annuity Amount referred to in this Article II shall remain the same as provided in Paragraph 2.2.

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ARTICLE III

Distribution to Charity

SELECT ONE VERSION: #1 VESTED, #2 CHANGEABLE, OR #3 UNNAMED--

VERSION #1—NAMED, VESTED CHARITY(IES)

3.1 Termination of Trust. Upon the end of the Trust Term for the Recipients' noncharitable interests as described in Article II, Paragraph 2.1, the Trustee shall distribute all the principal and income of the Trust, other than any amount due to the surviving Recipient, free of trust to the following charitable remainderman or remaindermen in the shares indicated:
[NAME OF CHARITY(IES)]..... [STATE PERCENT HERE FOR EACH-XXX%]

3.2 Use by Charitable Remainderman. [NAME OF CHARITABLE REMAINDERMAN] shall use the funds distributed to it pursuant to Paragraph 3.1 for

OPTION #1

general, unrestricted purposes.

OR

OPTION #2

the following restricted purpose(s):
[STATE RESTRICTED PURPOSES HERE—REPEAT THIS PARAGRAPH FOR MULTIPLE CHARITIES AND NUMBER ANY SUBPARAGRAPHS FOR MULTIPLE CHARITIES AS 3.2 (a), 3.2(b), ETC.]

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[OPTIONAL ESCAPE CLAUSE FOR RESTRICTED PURPOSES]—

If at any time in the judgment of the [NAME OF PERSON OR GOVERNING BODY WHO MAY CHANGE RESTRICTION] it is impossible or impracticable to carry out exactly the above purpose in the above manner, a purpose and manner as near as is practicable to the above purpose and manner shall be determined by the [NAME OF PERSON OR GOVERNING BODY WHO MAY CHANGE RESTRICTION].

VERSION #2—REDESIGNATION OF NAMED CHARITY/IES

[FOR REDESIGNATION OF **NAMED** CHARITY IN 3.1, BOTH **3.2 AND 3.3 GO TOGETHER WITH 3.1]**

3.1 Termination of Trust. Upon the end of the Trust Term for the Recipients' noncharitable interests as described in Article II, Paragraph 2.1, the Trustee shall distribute all the principal and income of the Trust, other than any amount due to the surviving Recipient, free of trust to the following charitable remainderman or remaindermen in the shares indicated:

[NAME OF CHARITY(IES)]..... [STATE PERCENT HERE FOR EACH-XXX%]

3.2 Right to Redesignate Charitable Remainderman. The Charitable Remainder beneficiary designation named in Paragraph 3.1 may be redesignated [BY THE SETTLORS JOINTLY] [AND THEREAFTER BY THE SURVIVING SETTLOR] by a specific written instrument delivered [BY THE SETTLORS] [BY THE SURVIVING SETTLOR] to the Trustee, adding or substituting other Charitable Remaindermen and/or changing the shares of any one or more Charitable Remaindermen previously designated. If such redesignation is made during the Trust Term, the specific

written instrument must be received by the Trustee within six months of the termination of the noncharitable interest of the Trust. However, if such redesignation is made upon a Settlor's death by the Settlor's Will, Living Trust, or other testamentary beneficiary designation, for such redesignation to be effective, notice of the redesignation must be received by the Trustee within six months of the date of death of the Settlor and the Settlor's Will, Living Trust, or other testamentary beneficiary designation must specifically refer to the power of appointment conferred in this Paragraph 3.2. The last dated written instrument delivered to the Trustee shall control the designation of the charitable interest.

3.3 Distribution of Undesignated Charitable Remainder. If any amount has been left undesignated upon the termination of the noncharitable interests, whether advertently or inadvertently, the Trustee shall first distribute any designated portion of the principal and income of the Trust, other than any amount due to the surviving Recipient, free of trust to any Charitable Remainderman or Remaindermen known to be, or discovered to be, designated by any last written instrument delivered by the Settlor or Settlors to the Trustee as provided in Paragraph 3.2. The Trustee then, in Trustee's discretion, may distribute any remaining undesignated amount discovered in any last specific written instrument validly executed but undelivered to the Trustee to any Charitable Remainderman or Remaindermen named therein. However, if no designation has been made, or is known by or discovered by the Trustee to have been made, by the Settlor or Settlors as to any portion of the remainder interest by the end of the six months after the date of death of the designating Settlor, the Trustee in its discretion shall designate as Charitable Remainderman or Charitable Remaindermen one or more organizations of the type described in sections 170(b)(1)(A), 170(c), 2055(a) and 2522(a) of the Code.

[NOTE: REMEMBER TO REMOVE 170(b)(1)(A) FOR PRIVATE NONOPERATING FOUNDATIONS AS REMAINDERMAN]

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3.4 Use by Redesignated Charitable Remainderman. If a Charitable Remainderman is or Charitable Remaindermen are redesignated pursuant to this Article III, Paragraph 3.2 or 3.3, the Charitable Remainderman or Remaindermen shall use the funds distributed to it/them for the purposes described in the written instrument of redesignation delivered to the Trustee. If no such restricted use or purpose has been described in the written instrument of redesignation, the Charitable Remainderman or Remaindermen shall use the funds for general, unrestricted purposes.

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VERSION #3- NO CHARITY NAMED AT INCEPTION OF TRUST —

OPTION #1--SETTLOR DESIGNATES CHARITY(IES) LATER

3.1 Termination of Trust. Upon the end of the Trust Term for the Recipients' noncharitable interests as described in Article II, Paragraph 2.1, the Trustee shall distribute any undesignated portion of the principal and income of the Trust, other than any amount due to the Recipient(s), free of trust to the Charitable Remainderman or Remaindermen designated in the last specific written instrument delivered [BY THE SETTLORS JOINTLY] [AND THEREAFTER BY THE SURVIVING SETTLOR] to the Trustee. However, if such designation is made by a Settlor's Will, Living Trust, or other testamentary beneficiary designation, for such designation to be effective, notice of the designation must be received by the Trustee within six months of the date of death of the Settlor, and the Settlor's Will, Living Trust, or other testamentary beneficiary designation must specifically refer to the power conferred in this Paragraph 3.1. The Charitable Remainderman or Remaindermen designated shall be one or more

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organizations of the type described in sections 170(b)(1)(A), 170(c), 2055(a) and 2522(a) of the Code.

[NOTE: REMEMBER TO REMOVE 170(b)(1)(A) FOR PRIVATE NONOPERATING FOUNDATIONS AS REMAINDERMAN]

3.2 Distribution of Undesignated Charitable Remainder. If any amount has been left undesignated upon the termination of the noncharitable interests, whether advertently or inadvertently, the Trustee shall first distribute any designated portion of the principal and income of the Trust, other than any amount due to the surviving Recipient, free of trust to any Charitable Remainderman or Remaindermen known to be, or discovered to be, designated by any last written instrument delivered [BY THE SETTLORS] [BY THE SURVIVING SETTLOR] to the Trustee as provided in Paragraph 3.1. The Trustee then, in Trustee's discretion, may distribute any remaining undesignated amount discovered in any last specific written instrument validly executed but undelivered to the Trustee to any Charitable Remainderman or Remaindermen named therein. However, if no designation has been made, or is known by or discovered by the Trustee to have been made by the Settlor as to any portion of the remainder interest by the end of the six months after the date of death of the Settlor, the Trustee in its discretion shall designate as Charitable Remainderman or Charitable Remaindermen one or more organizations of the type described in sections 170(b)(1)(A), 170(c), 2055(a) and 2522(a) of the Code.

[NOTE: REMEMBER TO REMOVE 170(b)(1)(A) FOR PRIVATE NONOPERATING FOUNDATIONS AS REMAINDERMAN]

3.3 Use by Charitable Remainderman. If a Charitable Remainderman is or Charitable Remaindermen are designated or redesignated pursuant to this Article III, Paragraph 3.2, the Charitable Remainderman or Remaindermen shall use the funds distributed to it/them for the purposes as described in the written instrument of designation delivered to the Trustee. If no such restricted use or purpose has been described in the written instrument of designation or redesignation, the Charitable Remainderman or Remaindermen named in those instruments shall use the funds for general, unrestricted purposes.

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OPTION #2—RECIPIENTS NAME CHARITY(IES) LATER

3.1 Termination of Trust. Upon the termination of the noncharitable interests, the Trustee shall distribute any undesignated portion of the principal and income of the Trust, other than any amount due to the Recipient(s), free of trust to the Charitable Remainderman or Remaindermen as designated by the last specific written instrument delivered to the Trustee by the [RECIPIENTS JOINTLY] [LAST SURVIVING RECIPIENT] then entitled to current distributions from the Trust. However, if such designation is made by a Recipient's Will, for such appointment to be effective, notice of the designation must be received by the Trustee within six months of the date of death of the Recipient and the Recipient's Will must specifically refer to the power conferred in this Paragraph 3.1. The charitable remainderman or remaindermen so appointed shall be one or more organizations of the type described in sections 170(b)(1)(A), 170(c), 2055(a) and 2522(a) of the Code.

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3.2 Distribution of Undesignated Charitable Remainder. If any amount has been left undesignated upon the termination of the noncharitable interests, whether advertently or inadvertently, the Trustee shall first distribute any designated portion of the principal and income of the Trust, other than any amount due to the surviving Recipient, free of trust to any Charitable Remainderman or Remaindermen known to be, or discovered to be, designated by any last written instrument delivered by the [RECIPIENT] [SURVIVING RECIPIENT] to the Trustee as provided in Paragraph 3.1. The Trustee then, in Trustee's discretion, may distribute any remaining undesignated amount discovered in any last specific written instrument validly executed but undelivered to the Trustee to any Charitable Remainderman or Remaindermen named therein. However, if no designation has been made, or is known by or discovered by the Trustee to have been made by the Settlor as to any portion of the remainder interest by the end of the six months after the date of death of the Settlor, the Trustee in its discretion shall designate as Charitable Remainderman or Charitable Remaindermen one or more organizations of the type described in sections 170(b)(1)(A), 170(c), 2055(a) and 2522(a) of the Code.

[NOTE: REMEMBER TO REMOVE 170(b)(1)(A) FOR PRIVATE NONOPERATING FOUNDATIONS AS REMAINDERMAN]

3.3 Use by Charitable Remainderman. If a Charitable Remainderman is or Charitable Remaindermen are designated or redesignated pursuant to this Article III, Paragraph 3.2 or 3.3, the Charitable Remainderman or Remaindermen shall use the funds distributed to it/them for the purposes as described in the written instrument of designation delivered to the Trustee. If no such restricted use or purpose has been described in the written instrument of designation or redesignation, the Charitable Remainderman or Remaindermen named in those instruments shall use the funds for general, unrestricted purposes.

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MANDATORY FOR ALL THREE VERSIONS--

3.X Alternate Charitable Remainderman. In the event that a Charitable Remainderman named in or pursuant to this Article III is not, upon the termination of the noncharitable interests, an organization of the type described in sections 170(b)(1)(A), 170(c), 2055(a) and 2522(a) of the Code,

[NOTE: REMEMBER TO REMOVE 170(b)(1)(A) FOR PRIVATE NONOPERATING FOUNDATIONS AS REMAINDERMAN]

OPTION #1—DIVISION AMONG REMAINING REMAINDERMEN

the amount which would have been transferred to such remainderman shall instead be divided among the remaining remaindermen that meet the requirements of the sections referred to in this subparagraph in the same relative proportions as specified in or pursuant to this Article III. if no remainderman meets the requirements of these sections, the amount which would have been transferred to such remaindermen shall instead be transferred to one or more organizations described in Section 170(b)(1)(A), 170(c), 2055(a) and 2522(a) of the Code, in the sole discretion of the Trustee, or any successor Trustee then acting.

[NOTE: REMEMBER TO REMOVE 170(b)(1)(A) FOR PRIVATE NONOPERATING FOUNDATIONS AS REMAINDERMAN]

OPTION #2—TRANSFERRED TO CHARITIES CHOSEN BY TRUSTEE

the amount which would have been transferred to such remainderman shall instead be transferred to one or more organizations described in Section 170(b)(1)(A),

170(c), 2055(a) and 2522(a) of the Code, in the sole discretion of the Trustee, or any successor Trustee then acting.

NOTE: REMEMBER TO REMOVE 170(b)(1)(A) FOR PRIVATE NONOPERATING FOUNDATIONS AS REMAINDERMAN]

THE FOLLOWING OPTIONAL 3.X GOES TOGETHER WITH OPTIONAL 2.X IN ARTICLE III CALLED [UNITRUST] [ANNUITY]Amount After Early Distribution to Charity.**– THIS OPTION HAS MANY CHOICES.**

3.X Early Distribution to Charity Prior to the Termination of the Trust Term.

[**CHOICE #1**]: The Trustee may distribute currently a portion of the Trust assets to [THE CHARITABLE REMAINDERMEN NAMED IN OR PURSUANT TO THIS ARTICLE III] [A CHARITY] provided that the charity is of a type described in sections 170(b)(1)(A), 170(c), 2055(a), and 2522(a) of the Code.

OR

[**CHOICE #2**]: If Settlor[S], [OR THE SURVIVING SETTLOR], [IS/ARE] serving as Trustee, the Trustee may distribute currently a portion of the Trust assets to [THE CHARITABLE REMAINDERMEN NAMED IN OR PURSUANT TO THIS ARTICLE III] [A CHARITY] provided that the charity is of a type described in sections 170(b)(1)(A), 170(c), 2055(a), and 2522(a) of the Code.

OR

[**CHOICE #3**]: The Trustee may distribute currently a portion of the Trust assets to [THE CHARITABLE REMAINDERMEN NAMED IN OR PURSUANT TO THIS

ARTICLE III] [A CHARITY] based upon Trustee's discussion with the Settlor[S], [OR THE SURVIVING SETTLOR], provided that the charity is of a type described in sections 170(b)(1)(A), 170(c), 2055(a), and 2522(a) of the Code.

OR

[**CHOICE #4**]: The Trustee shall distribute currently a portion of the Trust assets to [THE CHARITABLE REMAINDERMEN NAMED IN OR PURSUANT TO THIS ARTICLE III] [A CHARITY] based upon written notice to the Trustee from the Settlor[S], [OR THE SURVIVING SETTLOR], indicating the amount to be distributed and when it is to be distributed, provided that the charity is of a type described in sections 170(b)(1)(A), 170(c), 2055(a), and 2522(a) of the Code.

OR

[**CHOICE #5**]--

The Trustee may distribute currently a portion of the Trust assets to any one or all of the charitable remaindermen named in or pursuant to this Article III in the shares set forth therein or any other shares, whether equal or unequal, or some to certain charitable remaindermen and none to other charitable remaindermen named in or pursuant to Paragraphs 3.1 and 3.2, based upon Trustee discussion with the Settlor which is notated and dated on a Schedule B to this Trust attached hereto and made part hereof.

OR

[**CHOICE #6**]: The Trustee shall distribute currently a portion of the Trust assets to [THE CHARITABLE REMAINDERMEN NAMED IN OR PURSUANT TO THIS ARTICLE III] [A CHARITY] based upon the following standard set by the Settlors, or the surviving Settlor, provided that the charity is of a type described in sections

170(b)(1)(A), 170(c), 2055(a), and 2522(a) of the Code: [DESCRIBE EXACT STANDARD HERE].

NOTE: NO MATTER WHICH CHOICE IS MADE, IT MUST BE FOLLOWED BY THIS PARAGRAPH. FILL IN CORRECT PARAGRAPH # --

If any charity named pursuant to this Paragraph 3.X is not of a type described in sections 170(b)(1)(A), 170(c), 2055(a), and 2522(a) of the Code, the distribution to that charity shall lapse and the assets to be distributed to that charity shall remain in trust. After any distribution pursuant to this Paragraph 3.X payment of the

IF UNITRUST-

Unitrust Amount referred to in Article II shall be calculated based on the remaining net fair market value of the Trust assets as of the next succeeding valuation date.

IF ANNUITY TRUST-

Annuity Amount shall remain the same as provided in Paragraph 2.2.

[FOR ALL OPTIONS ABOVE --REMOVE 170(b)(1)(A) FOR PRIVATE NONOPERATING FOUNDATIONS]

MANDATORY PARAGRAPH. FILL IN CORRECT PARAGRAPH #

3.X Adjusted Basis of Property. In the case of distributions in kind to charity during the Trust Term, the adjusted basis of the property distributed must be fairly representative of the adjusted basis of the property available for payment on the date of payment.

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OPTION TO TERMINATE ON LAST PAYMENT DATE, STUB INCOME THEN GOES TO CHARITY INSTEAD OF SETTLOR'S ESTATE – FILL IN CORRECT PARAGRAPH #

3.X Termination Date. For purposes of this Article III, the noncharitable interests shall be deemed to terminate with the regular payment next preceding the actual termination date.

OPTION FOR QUALIFIED CONTINGENCY - FILL IN CORRECT PARAGRAPH #

3.X Qualified Contingency. In accordance with the provisions of section 664(f)(3) of the Code permitting the early termination of the Trust based on a contingency, the Trust shall terminate prior to the Trust Term stated in Article II if the following contingency occurs: [STATE CONTINGENCY HERE]. The Trustee shall terminate the Trust upon receiving credible evidence that the contingency has occurred or upon receiving a written determination from one or more credible sources that such contingency has occurred and shall then terminate the Trust and distribute the Trust Estate as provided in this Article III.

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ARTICLE IV

Valuation

4.1 Net Fair Market Value. In computing the net fair market value of the Trust assets, there shall be taken into account all of the Trust's assets and liabilities as of the date of such computation without regard to whether particular items are taken into account in determining the income or the principal of the Trust. All such determinations of net fair market value shall be made exclusively by the Trustee, the decision of whom, reached in good faith, shall be final and binding upon all persons interested in the Trust; provided, however, if there are unmarketable assets (as defined in Paragraph 4.3.1, and if a non-independent person is acting as Trustee, (as defined in Paragraph 4.3.2, the valuation of any unmarketable assets shall be made either by a Qualified Appraiser or an independent Special Trustee as provided in Paragraphs 6.10, 6.11 and 6.12.

4.2 Correction of Valuation. If the net fair market value of the Trust assets is incorrectly determined, the Trustee shall pay to the Recipient(s), or the personal representative of such Recipient(s), in the case of an undervaluation, or shall collect from the Recipient(s), or the personal representative of such Recipient(s), in the case of an overvaluation, an amount equal to the difference between the amount which the Trustee should have paid if the correct value had been used and the amount which the Trustee actually paid. The adjustment made by the Trustee due to an undervaluation shall be made immediately after the final determination of the correct value, and the adjustment made by the Recipient(s) upon an overvaluation shall be made within a reasonable period after final determination of the correct value.

4.3 Definitions:

4.3.1 Unmarketable Assets. Unmarketable assets shall mean, for all purposes of this Trust, assets other than cash, cash equivalents or other assets that can be

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readily sold or exchanged for cash or cash equivalents within the meaning of Regulation Section 1.664-1(a)(7)(ii).

4.3.2 Independent Trustee. Independent Trustee as defined in Treas. Reg. sec. 1.664-1(a)(7)(iii) shall mean a person or persons other than a Settlor, a noncharitable Recipient, and persons no more than half of whom are "Related or Subordinate Parties" who are subservient to the wishes of a Settlor as described in Section 674(c) of the Code. Related or Subordinate Parties as used herein shall be defined pursuant to the definition in Section 672(c) of the Code.

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ARTICLE V

Additional Contributions; Testamentary Contributions

CHOICE FOR FLIPCRUT ADDITIONAL CONTRIBUTION UNITRUST AMOUNT

5.1 Additional Contributions; Valuation. In any taxable year in which an additional contribution or contributions are made to the Trust, the valuation to be made and the amount to be paid as described in Article II shall be computed in accordance with the Treas. Reg. sec. 1.664-3(b). In a taxable year in which an additional contribution is made after the Valuation Date described in Paragraph 2.2, the assets added shall be valued as of the date of additional contribution ("Valuation Date for Additional Contribution"), without regard to any post-contribution income or appreciation on such assets, rather than as of the Valuation Date described in Paragraph 2.2. The term "Valuation Date for Additional Contributions" shall be used for purposes of this Article V and shall refer to valuations made only for additional contributions.

5.1.1 Before Effective Date of Change of Method. Notwithstanding Paragraph 2.2, if any additional contributions are made to the Trust after the initial contribution and before the effective date of the Change of Method, the Unitrust Amount for the year in which the additional contribution is made shall be equal to the lesser of:

(a) a Fixed Percentage amount equal to [NUMBER IN WORD FORM] percent ([NUMBER IN NUMERIC FORM] %) {***MUST BE SAME PERCENT AS IN ARTICLE II}*** of the sum of:

(i) the net fair market value of the Trust assets as of the Valuation Date (excluding the assets so added and any post-contribution income from and appreciation on such assets during that year); and

(ii) for each additional contribution during the year, the fair market value

of the assets added as of the Valuation Date for Additional Contributions (excluding any post-contribution income from and appreciation on such assets during that year)

multiplied by a fraction the numerator of which is the number of days in the period that begins with the date of contribution and ends with the earlier of the last day of the taxable year or the last day of the unitrust period and the denominator of which is the number of days in the period that begins with the first day of such taxable year and ends with the earlier of the last day in such taxable year or the last day of the unitrust period (Trust Term) (hereinafter "the Fixed Percentage amount described in (a) of Paragraph 5.1.1"); and

(b) the Trust income for the taxable year (as defined in Section 643(b) of the Code and the regulations thereunder and Treasury Regulation Section ("Treas. Reg. Sec") 1.664-3(a)(1)(i)(b)(3)) as set forth in Paragraph 2.2.

The terms and provisions of Paragraph 2.3 shall remain applicable.

5.1.2 On or After Effective Date of Change of Method. If any additional contributions are made to the Trust after the initial contribution and on or after the effective date of the Change of Method, the Fixed Percentage described in Paragraph 2.2 for the year in which the additional contribution is made shall be [NUMBER IN WORD FORM] percent ([NUMBER IN NUMERIC FORM] %) ***{MUST BE SAME PERCENT AS IN ARTICLE II}*** of the sum of:

(i) the net fair market value of the Trust assets as of the Valuation Date (excluding the assets so added and any post-contribution income from, and appreciation on, such assets during that year); and

(ii) for each additional contribution during the year, the fair market value of the assets so added as of the Valuation Date for Additional Contributions (excluding any post-contribution income from, and appreciation on, such assets),

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multiplied by a fraction the numerator of which is the number of days in the period that begins with the date of contribution and ends with the earlier of the last day of the taxable year or the last day of the unitrust period and the denominator of which is the number of days in the period that begins with the first day of such taxable year and ends with the earlier of the last day in such taxable year or the last day of the unitrust period (Trust Term as defined in Paragraph 2.1).

CHOICE FOR NIMCRUT ADDITIONAL CONTRIBUTION UNITRUST AMOUNT

5.1.1 Additional Contributions; Valuation. In any taxable year in which an additional contribution or contributions are made to the Trust, the valuation to be made and the amount to be paid as described in Article II shall be computed in accordance with the Treas. Reg. sec. 1.664-3(b). In a taxable year in which an additional contribution is made after the Valuation Date described in Paragraph 2.2, the assets added shall be valued as of the date of additional contribution ("Valuation Date for Additional Contribution"), without regard to any post-contribution income or appreciation on such assets, rather than as of the Valuation Date described in Paragraph 2.2. The term "Valuation Date for Additional Contributions" shall be used for purposes of this Article V and shall refer to valuations made only for additional contributions.

5.1.2 Additional Contributions; Payments. Notwithstanding Paragraph 2.2, if any additional contributions are made to the Trust after the initial contribution, the Unitrust Amount for the year in which the additional contribution is made shall be equal to the lesser of:

(a) a Fixed Percentage amount equal to [NUMBER IN WORD FORM] percent ([NUMBER IN NUMERIC FORM] %) {***MUST BE SAME PERCENT AS IN ARTICLE II}*** of the sum of:

(i) the net fair market value of the Trust assets as of the Valuation Date

(excluding the assets so added and any post-contribution income from and appreciation on such assets during that year); and

(ii) for each additional contribution during the year, the fair market value of the assets added as of the Valuation Date for Additional Contributions (excluding any post-contribution income from and appreciation on such assets during that year)

multiplied by a fraction the numerator of which is the number of days in the period that begins with the date of contribution and ends with the earlier of the last day of the taxable year or the last day of the unitrust period and the denominator of which is the number of days in the period that begins with the first day of such taxable year and ends with the earlier of the last day in such taxable year or the last day of the unitrust period (Trust Term as defined in Paragraph 2.1) (hereinafter "the Fixed Percentage amount described in (a) of paragraph 5.1.2"); and

(b) the Trust income for the taxable year (as defined in Section 643(b) of the Code and the regulations thereunder and Treasury Regulation Section ("Treas. Reg. Sec") 1.664-3(a)(1)(i)(b)(3)) as set forth in Paragraph 2.2.

The terms and provisions of Paragraph 2.3 shall remain applicable.

CHOICE FOR NICRUT ADDITIONAL CONTRIBUTION UNITRUST AMOUNT

5.1.1 Additional Contributions; Valuation. In any taxable year in which an additional contribution or contributions are made to the Trust, the valuation to be made and the amount to be paid as described in Article II shall be computed in accordance with the Treas. Reg. sec. 1.664-3(b). In a taxable year in which an additional contribution is made after the Valuation Date described in Paragraph 2.2, the assets added shall be valued as of the date of additional contribution ("Valuation Date for Additional Contribution"), without regard to any post-contribution income or appreciation on such assets, rather than as of the Valuation Date described in Paragraph 2.2. The term

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"Valuation Date for Additional Contributions" shall be used for purposes of this Article V and shall refer to valuations made only for additional contributions.

5.1.2 Additional Contributions; Payments. Notwithstanding Paragraph 2.2, if any additional contributions are made to the Trust after the initial contribution, the Unitrust Amount for the year in which the additional contribution is made shall be equal to the lesser of:

(a) a Fixed Percentage amount equal to [NUMBER IN WORD FORM] percent ([NUMBER IN NUMERIC FORM] %) {***MUST BE SAME PERCENT AS IN ARTICLE II***} of the sum of:

(i) the net fair market value of the Trust assets as of the Valuation Date (excluding the assets so added and any post-contribution income from and appreciation on such assets during that year); and

(ii) for each additional contribution during the year, the fair market value of the assets added as of the Valuation Date for Additional Contributions (excluding any post-contribution income from and appreciation on such assets during that year)

multiplied by a fraction the numerator of which is the number of days in the period that begins with the date of contribution and ends with the earlier of the last day of the taxable year or the last day of the unitrust period and the denominator of which is the number of days in the period that begins with the first day of such taxable year and ends with the earlier of the last day in such taxable year or the last day of the unitrust period (Trust Term as defined in Paragraph 2.1) (hereinafter "the Fixed Percentage amount described in (a) of paragraph 5.1.2"); and

(b) the Trust income for the taxable year (as defined in Section 643(b) of the Code and the regulations thereunder and Treasury Regulation Section ("Treas. Reg. Sec") 1.664-3(a)(1)(i)(b)(3)) as set forth in Paragraph 2.2.

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CHOICE FOR SCRUT ADDITIONAL CONTRIBUTION UNITRUST AMOUNT

5.1.1 Additional Contributions; Valuation. In any taxable year in which an additional contribution or contributions are made to the Trust, the valuation to be made and the amount to be paid as described in Article II shall be computed in accordance with the Treas. Reg. sec. 1.664-3(b). In a taxable year in which an additional contribution is made after the Valuation Date described in Paragraph 2.2, the assets added shall be valued as of the date of additional contribution ("Valuation Date for Additional Contribution"), without regard to any post-contribution income or appreciation on such assets, rather than as of the Valuation Date described in Paragraph 2.2. The term "Valuation Date for Additional Contributions" shall be used for purposes of this Article V and shall refer to valuations made only for additional contributions.

5.1.2 Additional Contributions; Payments. Notwithstanding Paragraph 2.2, if any additional contributions are made to the Trust after the initial contribution, the Unitrust Amount for the year in which the additional contribution is made shall be [NUMBER IN WORD FORM] percent ([NUMBER IN NUMERIC FORM] %) ***{MUST BE SAME PERCENT AS IN ARTICLE II}*** of the sum of:

(i) the net fair market value of the Trust assets as of the Valuation Date (excluding the assets so added and any post-contribution income from and appreciation on such assets during that year); and

(ii) for each additional contribution during the year, the fair market value of the assets added as of the Valuation Date for Additional Contributions (excluding any post-contribution income from and appreciation on such assets during that year)

multiplied by a fraction the numerator of which is the number of days in the period that begins with the date of contribution and ends with the earlier of the last day of the taxable year or the last day of the unitrust period and the denominator of which is the number of days in the period that begins with the first day of such taxable year and ends with the

earlier of the last day in such taxable year or the last day of the unitrust period (Trust Term as defined in Paragraph 2.1).

CHOICE FOR ANNUITY TRUST -- NO ADDTIONAL CONTRIBUTIONS ALLOWED-
SEE ADDENDUM FOR OTHER NECESSARY CHANGES

5.1 Additional Contributions.

No additional contributions may be made to this Trust after the initial contribution.

CONTINUE AND USE 5.2 FOR UNITRUST VERSIONS ONLY

5.2 Testamentary Contributions. If any contribution is made by Will or other instrument which causes a contribution to be transferred at death, all property contributed to the Trust by reason of the death of a Settlor shall be considered a single contribution. The obligation to pay the amount specified in Article II, with respect to such contribution, shall commence with the date of death of the person under whose Will or other written instrument the contribution is made, but payment of such amount may be deferred from such date of death until the end of the taxable year of the Trust in which the complete funding of the contribution occurs. Within a reasonable period after such time, the Trustee must pay to the Recipient(s), or the personal representative of such Recipient(s), in the case of an underpayment, or must receive from the Recipient(s), or the personal representative of such Recipient(s), in the case of an overpayment, the difference between:

(a) any amounts specified in Article II actually paid, plus interest, compounded annually, computed for any period at the rate of interest that the Treasury Regulations under Section 664 of the Code prescribe for the Trust for such computation for such period, and

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(b) the Unitrust Amounts payable as specified in Article II, plus interest on such amounts computed at the rate of interest specified in Treas. Reg. sec. 1.664-1(a)(5)(iv), compounded annually, determined under the method described either in Treasury Regulation Section 1.664-1(a)(5)(i)(b) or (ii).

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ARTICLE VI

Provisions Regarding Trusteeship

6.1 Trustee Control of Assets and Income. The Trustee shall hold all assets of the Trust and collect all income of the Trust. The Trustee shall maintain or cause to be maintained the records of the Trust. After the end of each taxable year of the Trust, the Trustee shall prepare a statement showing how the property of the Trust is invested and the receipts and disbursements of the Trust for the preceding taxable year. The Trustee shall provide the statement and accountings to parties of interest in accordance with Paragraph 7.X

6.2 Right to Resign. Any Trustee shall have the right to resign at any time upon thirty (30) days written notice to the Settlors or the surviving Settlor, or earlier if a successor Trustee has accepted the Trustee duties sooner than thirty days. The Trustee shall continue to act until a successor Trustee accepts the Trusteeship. Such resignation shall become effective upon the acceptance by the successor Trustee.

6.3 Right to Remove. While alive and competent, the Settlors, acting jointly, [AND THEREAFTER THE SURVIVING SETTLOR ACTING ALONE,] shall have the right to remove any Trustee or successor Trustee at any time upon written notice. Upon such removal, a successor Trustee shall be appointed pursuant to the provisions in Paragraph 6.4, and the departing Trustee shall remit all Trust records and accounts within [e.g. -- FIFTEEN (15)] days of the date of the written notice. [**OPTIONAL**-- IF THE SETTLOR(S) HAS/HAVE PREDECEASED A SURVIVING RECIPIENT, THE SURVIVING RECIPIENT SHALL HAVE THE RIGHT TO REMOVE THE TRUSTEE.]

6.4 Appointment and Replacement of Trustees. While alive and competent, the Settlors, acting jointly, and the surviving Settlor acting alone, shall have the right at

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any time, and for any reason, to appoint one or more Trustees, Co-trustees, successor Trustees or successor Co-trustees.

OPTION #1 –ONLY ONE SETTLOR IS SERVING AS TRUSTEE

In the case of the resignation, refusal, removal or inability to act of the initial Trustee, [NAME OF A DEFAULT SUCCESSOR TRUSTEE] of [CITY, STATE] shall serve as Trustee. If [HE/SHE/IT] cannot act, then [SECOND NAME OF A DEFAULT SUCCESSOR TRUSTEE] of [CITY, STATE] shall serve as Trustee.

OPTION #2--OF INITIAL CO-TRUSTEES ONE CAN'T SERVE, OTHER SERVES AS SOLE TRUSTEE

In the case of the resignation, refusal, removal or inability to act of one of the original Co-trustees, the remaining successor Co-trustee(s) shall continue to act as sole trustee. [IF THE REMAINING SOLE TRUSTEE CANNOT ACT, NAME OF DEFAULT SUCCESSOR TRUSTEE] of [CITY, STATE] shall act as Trustee. If [HE/SHE/IT] cannot act, then [SECOND NAME OF A DEFAULT SUCCESSOR TRUSTEE] of [CITY, STATE] shall serve as Trustee.

OPTION #3-- SUCCESSOR TRUSTEES NOT APPOINTED, DEFAULT SUCCESSOR--

In the case of the resignation, refusal, removal or inability to act of a Trustee where the Office of Trustee is vacant where the Settlors have not, or the surviving Settlor has not, otherwise appointed a Successor Trustees within 30 days, [NAME OF DEFAULT SUCCESSOR TRUSTEE] of [CITY, STATE] shall act as Trustee. If [HE/SHE/IT] cannot act, then [SECOND NAME OF A DEFAULT SUCCESSOR TRUSTEE] of [CITY, STATE] shall serve as Trustee.

OPTION #4 –ORIGINAL TRUSTEE CANNOT SERVE, RECIPIENT APPOINTS SUCCESSOR TRUSTEE---

If no successor Trustee is acting, and neither Settlor is a Recipient, the Recipient or the majority of adult Recipients shall appoint a successor Trustee.

OPTION #5— CHARITY IS TRUSTEE AND CANNOT SERVE, CHARITABLE REMAINDERMAN APPOINTS SUCCESSOR TRUSTEE

If the Charitable Remainderman is acting as Trustee and can no longer serve, the Charitable Remainderman shall appoint a successor Trustee.

OPTION #6---NAMED CHARITY APPOINTS WHERE NO SUCCESSOR TRUSTEE ACTING

If a Charitable Remainderman is named in Article III but is not serving as Trustee and no successor Trustee is acting, [NAME OF CHARITABLE REMAINDERMAN] shall appoint a successor Trustee.

FOR ALL OPTIONS ADD AT END--

If no Successor Trustee is acting and none has been successfully appointed, a Successor Trustee shall be appointed by a court of competent jurisdiction.

6.5 Incapacity of Trustee. The determination as to whether an individual Trustee shall be considered incapacitated shall be made by the written opinion of the individual's primary physician or any other two physicians for the following two reasons, stating that the individual (1) is under a legal disability or (2) is unable to give prompt and intelligent

consideration to financial matters by reason of illness or mental or physical disability. In addition, the Trustee shall be deemed incapacitated if the [SETTLOR(s)] [RECIPIENT(s)] has/have received credible evidence that such individual has disappeared, is unaccountably absent or is being detained under duress, or due to the written order of any courts that the Trustee is incapacitated.

6.6 **OPTION #1- NO BOND**

No Bond Required. No bond or other security shall be required of any Trustee for the faithful performance of its duties in such capacity.

6.6 **OPTION #2 –BOND REQUIRED**

Bond Required in Certain Cases. No bond shall be required of any Settlor, Recipient, a Charitable Remainderman named in or pursuant to Article III, or a corporation serving as Trustee, for the faithful performance of its duties in such capacity. Bond shall be required of any other Trustee who serves under this instrument.

6.7 Survival of Rights and Powers. All rights, powers, authority, immunity and discretion herein granted or conferred upon the original Trustee shall survive to and may be exercised by, or applied in the same manner and to the same extent by, any successor Trustee that may at any time be acting hereunder. Each Trustee shall be responsible only for its own acts or omissions. A successor Trustee shall not be required to audit or investigate the acts or administration of any predecessor and shall be relieved of all liability for failing to do so.

6.8 Institutional Trustee. Reference herein to the Trustee shall include any institution, corporation, company, or association that may become a successor Trustee or any successor institution that may succeed to an institutional Trustee's business.

6.9 Actions by Co-Trustees.

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OPTION #1—JOINT ACTIONS

During such times as two or more persons are acting as Trustee, such Trustees shall act by joint vote if there are two Co-trustees or by majority vote in the case of more than two Co-trustees.

OPTION #2—ONE TRUSTEE CAN ACT ALONE

One of the Co-trustees shall have the power to act on behalf of the Trust at any time and shall have the power and authority to bind the Trust on behalf of both Co-trustees. In addition, during such times as two or more persons are acting as Trustee, some or all of the powers of one or more of the Trustees may be transferred to one or more of the other Trustees by a written instrument signed by all of the Trustees then acting.

6.10 Unmarketable Assets. Whenever the Trust Estate includes Unmarketable Assets, or whenever the Trust acquires a deferred annuity contract of any type (hereinafter "Annuity Contract"), and where no Independent Trustee or Co-Trustee is acting, as defined in Paragraph 4.3.2, a Special Trustee (as defined in this Paragraph) or a successor Special Trustee may be appointed by the [TRUSTEE] [SETTLORS ACTING JOINTLY OR THE SURVIVING SETTLOR]. The Special Trustee and any successor thereto must be an Independent Trustee as defined in Paragraph 4.3.2.

6.10 (a) Special Trustee to Make Valuations. With respect to Unmarketable Assets, the Special Trustee shall make all valuations of such Trust assets, and any other Trustee then serving shall have no power, duty, right, or obligation with respect to such valuations.

6.10 (b) Special Trustee Discretion Over Annuity Contracts. With respect to Annuity Contracts, any discretion provided to the owner of such an Annuity Contract

shall be exercised by the Special Trustee, including by way of example (but not limited to):

(i) partially or totally surrendering the Annuity Contract at any time or from time to time;

(ii) making partial withdrawals from the Annuity Contract, giving due regard to any withdrawal or partial surrender penalties that may be imposed and the best interests of all Trust beneficiaries;

(iii) electing any annuity option(s) therein granted; provided, however that any option so elected must guarantee the payment to the Trust by or upon the death of the annuitant of an amount at least equal to the surrender value of the Annuity Contract as of the day before the annuity payments commence;

(iv) designating the annuity starting date; and

(v) seeing to the allocation of any payments of any type received from the Annuity Contract between principal and income as is required by this Agreement and the Principal and Income laws of [STATE].

Said discretion(s) shall be exercised solely by the Special Trustee and any other Trustee then serving shall have no power, duty, right or obligation with respect to such exercise of such discretion.

6.10 (c) Special Trustee Duties. The Special Trustee shall have no powers, duties, rights or obligations hereunder except with respect to matters described above. The Special Trustee may not undertake his or her duties in a manner which would jeopardize the continuing status of the Trust as a charitable remainder trust as defined in Section 664 of the Code, Regulations and Revenue Rulings governing the operation thereof. The Special Trustee shall provide to the Trustee in a timely manner an accounting showing all valuations, receipts, disbursements, and distributions regarding any assets over which the Special Trustee has authority, including the method used to arrive at such values. If no

written protest is received by the Special Trustee within sixty (60) days of the delivery of such statement, it will be presumed that the Trustee has approved such statement.

6.10 (d) Special Trustee Resignation and Removal. The Special Trustee shall have the right to resign at any time upon thirty (30) days written notice to the [TRUSTEE] [SETTLORS JOINTLY OR THE SURVIVING SETTLOR]. The [TRUSTEE] [SETTLORS JOINTLY OR THE SURVIVING SETTLOR] shall have the right to immediately remove the Special Trustee at any time upon written notice and the departing Special Trustee shall remit all Trust records and accounts within fifteen (15) days of the date of the written notice.

6.10 (e) Special Trustee Compensation. The Special Trustee may be paid reasonable compensation for his/her/its services and shall be reimbursed for reasonable expenses incurred on behalf of the Trust.

6.11 Qualified Appraiser. Whenever the Trust Estate includes Unmarketable Assets, where no Independent Trustee or Co-Trustee as defined in Paragraph 4.3.2 is acting, the Trustee may obtain a current Qualified Appraisal of such Trust assets, as defined in Treas. Reg. sec. 1.170A-17(a) from a Qualified Appraiser as defined in Treas. Reg. sec. 1.170A-17(b). Such Qualified Appraisal shall be kept with the original Trust records and accounts.

6.12 Choice of Independent Trustee or Qualified Appraiser. In any taxable year of the Trust, the Trustee shall have the right to select between the use of an independent Special Trustee as provided in Paragraph 6.10 or a Qualified Appraiser as provided in Paragraph 6.11.

6.13 No Personal Liability of Trustee. No Trustee shall be required to obligate itself individually or be liable to pay personally or incur the payment of any damages, attorneys' fees, fines, penalties, forfeitures, costs, charges or other sums of money personally whatsoever for acting on behalf of this Trust and faithfully fulfilling its duties as Trustee under this Agreement. Liability for any Trustee actions in carrying out its

responsibilities under this Trust agreement shall not exceed the assets of the Trust Estate and only Trust Estate assets shall fulfill the payment and discharge of any such Trust liability or obligation.

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ARTICLE VII

Trustee Powers

7.1 Statutory Powers. In administering the Trust, the Trustee shall have all the Trustee powers and discretions conferred upon it by the statutory powers enumerated in the laws of the State of [NAME OF STATE LAW GOVERNING THIS TRUST] in addition to the following powers and any conferred by other provisions of this Agreement, subject to Paragraph 8.2.

(a) To retain, without liability for loss or depreciation resulting from such retention, any property, real or personal, tangible or intangible, or mixed, received hereunder for such time in the discretion of the Trustee, although the retention of such property by reason of its character, amount, or proportion to the total Trust property or otherwise would not be appropriate in the absence of this provision, and without regard to the requirement of the Prudent Investor Rule or Uniform Prudent Investor Act, or any other rules of law governing the investment of trust funds or diversification of trust funds.

(b) To invest and reinvest the funds of the Trust in any kind of property, including, but not limited to, real or personal, tangible or intangible, shares of stock of any class, bonds and debentures, tax liens, notes, shares or interests in common trust funds, membership interests or units, percentage ownerships in entities, funds, by way of example, exchange traded funds, mutual funds or money market funds, options, warrants, currencies real or virtual, altcoins, fiat coins, stable coins, other forms of cryptocurrencies, tokens, NFTs, Decentralized Autonomous Organizations (DAO), or other types of strategies for the investment of Trust assets whether or not known at the date of execution of this Trust, and, in the discretion of the Trustee, irrespective of any laws, including the Prudent Investor Rule or Uniform Prudent Investor Act, or any other rules of

law governing the investment of trust funds or diversification of trust funds, unless such investment causes the Trust to fail to be qualified as a charitable remainder trust within the meaning of Section 664 of the Code and Treasury Regulations promulgated thereunder.

(c) To sell, convey, exchange, grant options to buy, lease, assign, transfer or otherwise dispose of all or any part of the Trust property.

(d) To receive additions to the Trust and to hold and administer the same under the provisions of this Agreement.

(e) To make any division or distribution hereunder either in cash or in kind or partly in each.

(f) To exercise in person or by proxy, all voting, option, subscription, reorganization, consolidation, merger, and liquidation rights, and all other rights and privileges of whatsoever nature, incident, appurtenant or pertaining to securities in the Trust, and, in connection therewith, to enter into any covenant or agreement binding the Trust, and to purchase any new securities issued as a result of, or in connection with, any such act.

(g) To settle, compromise, contest, or abandon claims or demands in favor of or against the Trust, and the discretion of the Trustee in this respect shall be conclusive and binding.

(h) To engage the services of competent legal, accounting, and investment counsel to assist and advise them in the administration of the Trust, and to pay for such services out of the principal or income as the Trustee in its discretion shall determine.

(i) To determine the market value of any investment of the Trust for any purpose on the basis of such quotation, evidence, data, or information, as the Trustee may deem pertinent and reliable, subject to the provisions of section 4.3.2.

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(j) To distribute in cash or in kind upon partial or final distribution.

(k) To register any securities in the name of the Trustee's nominee.

(l) To participate in any plans or proceedings for foreclosure or consolidations, merger, liquidation, or other reorganization of any corporation or organization having securities that are held as Trust property and, in connection therewith, deposit securities with and transfer title or securities upon the terms that the Trustee deems advisable to any protective or other committee established in connection with any such plan or proceeding.

(m) To borrow money for any Trust purpose on such terms and conditions as the Trustee deems advisable and obligate the Trust to repay the borrowing, provided that such borrowing may not cause acquisition indebtedness resulting in unrelated business income taxation or excise taxes.

(n) To determine whether any money or other property coming into its hands is part of the principal of the Trust, or the gross income therefrom, or the net income available for distribution thereunder; and to apportion between principal and income any loss or expenditures which, in the Trustee's opinion, should be apportioned and which to it may seem just and equitable. Any such determination as between principal and income so made by the Trustee in good faith shall be conclusive and binding upon all persons interested in the Trust.

[FOR NICRUT, NIMCRUT AND FLIPCRUT ADD THE FOLLOWING]

Any specific powers of Paragraphs 7.2, 7.3, 7.4 or 7.5 shall supersede the general power granted to the Trustee in this Paragraph 7.1(n).

(o) To enter into partnership or limited liability company with any other person, whether limited or general, provided that such partnership interest or limited liability membership does not run afoul of the prohibitions in Code section 4941, self-dealing rules, cause the Trust to fail to qualify as a charitable remainder

trust within the meaning of Section 664, or cause the Trust to have unrelated business taxable income or excise taxes.

(p) To make loans to any person at a fair rate of interest and with adequate security, provided that such loan does not run afoul of the prohibitions in Code section 4941, self-dealing rules, and does not exceed the remaining term of the Trust.

(q) To buy, sell and trade in securities of any nature, including short sales: provided, however, that trading on margin is prohibited as a borrowing causing debt-financed income and the imposition of an excise tax under Code section 664(c)(2).

(r) To abandon or disclaim property, in the discretion of the Trustee, which in this respect shall be conclusive and binding.

(s) To initiate, respond to or participate in any lawsuit, action, claim or proceeding.

7.2 Special Powers.

(a) Obligations at a Discount. The Trustee shall have the power to invest Trust assets in obligations sold at a discount from face value, including but not limited to zero coupon bonds. The proceeds from the sale, redemption or other disposition of such obligations shall be allocated to principal; provided, however, that the increase in value of such obligations in excess of the price at which they were issued shall be distributable as income no earlier than when the first principal cash is available, or if none is available, when said increase is realized by sale, redemption or other disposition of such obligation.

(b) Real Estate. The Trustee shall also have the following special powers:

(i) To inspect any Trust real property to determine compliance with any environmental law affecting such property or to respond to any environmental law affecting property held by the Trustee.

(ii) To refuse to accept real property as a Trust asset if the Trustee determines that there is a substantial risk that such property is contaminated by a hazardous substance or is being used or has been used for any activities directly or indirectly involving hazardous substances which could result in liability to the Trust or otherwise impair the value of Trust assets.

(iii) To take any action necessary to prevent, abate, clean up or otherwise respond to any actual or threatened violation of any environmental law affecting Trust real property prior to or after the initiation of enforcement action by any governmental body.

(iv) To disclaim or release any power granted or implied by a document, statute, or rule of law which the Trustee determines may cause the Trustee to incur personal liability under any environmental law.

(v) To charge against Trust real property the cost of any inspection, review, prevention, abatement, response, cleanup, or remedial action.

The Trustee shall not be personally liable to any beneficiary or other party for any decrease in value of Trust real property by reason of such Trustee's compliance with any environmental law, specifically including any reporting requirement under such law. Neither the acceptance by the Trustee of real property nor a failure by the Trustee to inspect property shall be deemed to create any inference as to whether there is or may be any liability under any environmental law with respect to such property. For purposes of this Paragraph, "environmental law" means any federal, state or local law, rule, regulation or ordinance relating to protection of the environment or human health, and "hazardous substance" means any substance defined as hazardous or toxic or otherwise regulated by any environmental law.

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REMOVE 7.3 FOR SCRUT AND CRAT, ONLY APPLIES TO NICRUT, NUMCRUT AND FIRST PHASE OF FLIPCRUT, RENUMBER FOLLOWING PARAGRAPHS

7.3 Life Insurance Policies; Annuities; Entities. In applying Section 643(b) of the Code and the Principal and Income laws of [STATE] to the administration of this Trust, Trust income shall not include any amount that is ordinary income for federal income tax purposes with respect to a life insurance policy or annuity contract or an entity, such as, but not limited to, a limited liability company, except when and to the extent such amounts are actually distributed to the Trust.

REMOVE 7.4 FOR SCRUT AND CRAT, ONLY APPLIES TO NICRUT, NUMCRUT AND FIRST PHASE OF FLIPCRUT, RENUMBER FOLLOWING PARAGRAPHS

7.4 Definition of Income. In applying Sections 643(b) of the Code, Treas. Reg. Section 1.664-3(a)(1)(i)(b)(3), and the Principal and Income laws of the State of [STATE] to the administration of this Trust, the term "income" shall mean the return in money or property derived from the use of principal, in accordance with the Principal and Income laws of the State of [STATE] (as amended from time to time), and, in the Trustee's discretion, any net realized (but in no event unrealized) gain on Trust principal. Trust principal shall be defined as the value of the original contribution, and proceeds from the sale or exchange of assets contributed to the Trust by the Settlor shall be allocated to principal to the extent of the fair market value of the contributed assets on the date of their contribution. Proceeds from the sale or exchange of assets purchased by the Trustee must be allocated to principal to the extent of the Trust's purchase price of those assets. Proceeds other than hereinabove stated may be allocated to income if the laws of the State of [STATE] Principal and Income Act (as amended from time to time) so allow.

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[OPTIONAL ADDITION ONLY FOR NICRUT, NIMCRUT AND FLIPCRUT IF ALLOWED BY STATE LAW AND IF IT COMPLIES WITH 643(b)]:

Notwithstanding the definition of income herein, the Trustee shall have the discretion to allocate these latter proceeds to the extent the laws of the State of [STATE] Principal and Income laws permit adjustments between income and principal to treat beneficiaries impartially.

7.5 Reserves. The Trustee, in his/her/its discretion, may set aside a reserve or allowance from Trust income for the depreciation of any real property or improvements thereon, or depletion of any natural resource asset transferred to or invested in by the Trust.

7.6 Accountings. The Trustee shall provide accountings and transaction reports for the Trust. Such accountings and reports will be presumed to have been approved by all parties to whom such statement is delivered if the parties do not give written notice of an objection to the Trustee within [NINETY (90) DAYS] after the date on which the accounting is rendered.

CHOOSE ONE:

OPTION #1—SETTLOR SERVES AS TRUSTEE

The Trustee shall furnish a copy of such statements to the Settlors, if then living, unless the Settlors serve or either of them serves as Trustee.

[OPTION #2-- IF THERE ARE RECIPIENTS OTHER THAN SETTLOR(S) AND SETTLOR(S) ARE NOT SERVING AS TRUSTEE--

The Trustee shall furnish a copy of such statements to each Recipient of the Trust eligible to receive current distributions from the Trust, unless the Recipient is the Trustee.

[OPTION #3]

If neither Settlor is serving as Trustee, and the Recipient is not serving as Trustee, the Trustee shall furnish such statement to the Settlors or the surviving Settlor and to all Recipients entitled to current distributions from the Trust.

7.7 Undervalued Remainder Interest. With respect to each contribution to the Trust, if, at the date of the contribution of property, the value of the remainder interest as determined under section 7520 of the Code (for the computation of the Settlor's or Settlors' income tax charitable deduction) is less than 10% of the total net fair market value of the contributed transfer as defined in section 664 (d)(2)(D) of the Code, any such contribution shall be deemed to be a separate trust in accordance with section 664(d)(4)(B) of the Code and any regulations thereunder.

SEE CRAT ADDENDUM FOR CRAT LANGUAGE FOR 7.7

7.8 Right to Relinquish Powers. The Trustee shall have the right to relinquish permanently any power listed herein which has been held by the Internal Revenue Service in a statutory or regulatory provision, a Revenue Ruling, or by a court having jurisdiction over this Trust to disqualify this Trust as a qualified charitable remainder trust and all other powers shall remain in full force and effect.

7.9 Legal Incapacity of Recipient. If at any time during the term of this Trust the Recipient becomes incapacitated (under the same standards as applicable to a Trustee in Paragraph 6.4), the Trustee may apply the Unitrust Amount exclusively for the benefit of the Recipient by paying it to a person holding a valid Durable Power of Attorney or a person who has been appointed conservator or guardian for the Recipient by a court of competent jurisdiction.

COMBINED INTERVIVOS TEMPLATE BASED ON TWO SETTLORS, TWO LIVES FlipCRUT
Revised 6-2-2024

****

_____ INITIAL

_____ INITIAL

COMBINED INTERVIVOS TEMPLATE BASED ON TWO SETTLORS, TWO LIVES FlipCRUT
Revised 6-2-2024

ARTICLE VIII

Trustee Prohibitions

OPTION #1 --FOR PUBLIC CHARITY

8.1 Prohibitions. Notwithstanding any other provision of this Trust Agreement, the Trustee shall not engage in any act of self-dealing as defined in section 4941(d) of the Code, as modified by section 4947(a)(2)(A), or make any taxable expenditure as defined in section 4945(d) of the Code as modified by section 4947(a)(2)(A).

OPTION #2—FOR PRIVATE NONOPERATING FOUNDATION REMAINDERMAN

8.1 Prohibitions. Notwithstanding any other provision of this Trust Agreement, the Trustee shall not engage in any act of self-dealing as defined in Section 4941(d) of the Code, as modified by Section 4947(a)(2)(a), make any investments that jeopardize the exempt purpose of the Trust within the meaning of Section 4944, as modified by Section 4947(a)(2)(A), retain any excess business holdings within the meaning of Section 4943, as modified by Section 4947(a)(2)(S), or make any taxable expenditure as defined in Section 4945(d) of the Code, as modified by section 4947(a)(2)(A).

8.2 Powers in Conflict with Federal Tax Law. Notwithstanding Article VII, the Trustee's powers and discretions shall not include any power or discretion which is in conflict with section 664 of the Code and the Regulations thereunder or any specific provision of this Agreement [, NOR SHALL SUCH POWERS INCLUDE ANY POWER OR EXERCISE OF DISCRETION THAT MAY CAUSE AN IMPOSITION OF

EXCISE TAX UNDER CODE SECTION 664(C)(2) DUE TO UNRELATED BUSINESS TAXABLE INCOME.]

MANDATORY PROVISION-

8.3 No Restrictions on Investments Permitted. Notwithstanding anything to the contrary herein, no provision of this Agreement shall be construed to restrict the Trustee from investing the property held in trust hereunder in a manner which could result in the annual realization of a reasonable amount of income or gain from the sale or disposition of such property.

****

_____ INITIAL

_____ INITIAL

COMBINED INTERVIVOS TEMPLATE BASED ON TWO SETTLORS, TWO LIVES FlipCRUT
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ARTICLE IX

Prohibition Against Certain Payments

9.1 Full and Adequate Consideration of Payments. No amount other than the amount described in Article II or an amount transferred for full and adequate consideration, may be paid to or for the use of any person other than an organization described in each of sections 170(b)(1)(A), 170(c), 2055(a), and 2522(a) of the Code.

[REMOVE 170(b)(1)(A) FOR PRIVATE NONOPERATING FOUNDATIONS]

9.2 No Tax Paid from Trust. No gift, legacy, succession, inheritance, estate taxes or generation-skipping transfer taxes which may be assessed against the property of the Trust created hereunder by reason of a Settlor's transfer to the Trust or a Settlor's death shall be paid out of any property held in trust hereunder.

OPTION #1--SETTLORS AS RECIPIENTS

Each Settlor/Recipient agrees on behalf of himself or herself, his or her heirs, legal representatives, successors and assigns, to provide for payments of any such taxes from sources other than property held by this Trust and to indemnify and hold harmless the Trustee from any and all liability for such taxes.

OPTION #2—RECIPIENTS OTHER THAN SETTLORS

Each Recipient agrees on behalf of himself or herself, his or her heirs, legal representatives, successors and assigns, to provide for payments of any such taxes from

_____ INITIAL

_____ INITIAL

sources other than property held by this Trust and to indemnify and hold harmless the Trustee from any and all liability for such taxes.

9.3 Failure to Furnish Funds for Taxes. If, notwithstanding the provisions of the above Paragraph 9.2, a death tax or taxes may for any reason be assessed against the property of the Trust, the interest of any surviving Recipient hereunder shall take effect only if he or she furnishes the funds for payment of any such taxes for which the Trust may be liable upon a Settlor's death. If the surviving Recipient fails to furnish those funds, for purposes of the part of this Trust attributable to the deceased Settlor's contribution, the surviving Recipient shall be deemed to have predeceased the Settlor.

****

COMBINED INTERVIVOS TEMPLATE BASED ON TWO SETTLORS, TWO LIVES FlipCRUT
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ARTICLE X

Trustee's and Agent's Fees

10.1 Trustee Fees.

OPTION #1—REASONABLE FEES

Reasonable fees may be paid to the Trustee for his/her/its services.

OPTION #2—REASONABLE FEES TO INSTITUTIONAL TRUSTEE

Reasonable fees may be paid to an institutional Trustee for services rendered. Fees will be as provided in the institutional Trustee's published schedule of fees from time to time in effect.

OPTION #3—CHARITABLE REMAINDERMAN AS TRUSTEE

A charitable remainderman serving as Trustee shall serve without compensation.

OPTION #4—FEES FOR INDIVIDUAL TRUSTEE

In the case of an individual Trustee, he or she shall be entitled to receive the same compensation as is customarily paid to institutional Trustees providing similar services in the geographic area in which the Trust is located.

OPTION #5—NO FEES TO TRUSTEE

While serving as Trustee the Settlors shall not receive any fees; however, reasonable fees may be paid to a successor Trustee for services rendered.

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ALL OPTIONS TO BE FOLLOWED BY—

Any Trustee may be reimbursed for reasonable expenses incurred on behalf of the Trust.

10.2 Fees to Agents. Reasonable fees may be paid to agents engaged by the Trustee.

10.3 Fees Allocated in Discretion of Trustee. Fees paid to the Trustee and to agents, if any, shall be charged against income or principal in the discretion of the Trustee.

10.4 Fees Not to Reduce Unitrust Amount.

FOR FLIPCRUT-

Fees paid to the Trustee and to agents shall in no way reduce the Unitrust Amount as determined by the Fixed Percentage set forth in Paragraph 2.2 after the Change of Method described in Paragraph 2.4.

FOR SCRUT-

Fees paid to the Trustee and to agents shall in no way reduce the Unitrust Amount.

FOR CRAT-

10.4 Fees Not to Reduce Annuity Amount. Fees paid to the Trustee and to agents shall in no way reduce the Annuity Amount.

****

COMBINED INTERVIVOS TEMPLATE BASED ON TWO SETTLORS, TWO LIVES FlipCRUT
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ARTICLE XI

Limited Power to Amend; No Power to Revoke

11.1 Limited Amendments. The provisions of this Agreement required for the purpose of obtaining and maintaining qualification as a qualified charitable remainder trust as defined in Section 664 of the Code may be amended by the Trustee only in such manner and to such extent as it deems necessary to comply with the requirements of such Code Section and Regulations thereunder.

OPTIONAL ADDITION-

Any other amendment made to this Trust for purposes unrelated to the Trust's qualification as a charitable remainder trust may only be made if such amendment does not disqualify this Trust as a charitable remainder trust within the meaning of Section 664 of the Code Section and Regulations thereunder. Any amendment attempted to be made that is determined to disqualify the Trust as a charitable remainder trust shall be null and void immediately prior to its adoption and shall be deemed not to have taken effect at all. Any amendment may be declared to be retroactively effective in which case the amendment shall be retroactively effective to the date specified in the amendment.

OPTIONAL RIGHT TO REVOKE SURVIVOR INTEREST

11.2 Right to Revoke Survivor Interest. The Settlor hereby retains the right exercisable only by will to revoke the interest herein of the Survivor Recipient. For the exercise of such right to be effective, notice of such revocation must be received by the Trustee within six months of the date of death of the Settlor and the revocation clause of the Settlor's Will must specifically refer to the power conferred in this Paragraph 11.2.

CHANGE TO 11.2 IF RIGHT TO REVOKE NOT USED

11.X Irrevocable Trust. Except as provided above in this Article XI, this Agreement may not be altered, amended, or revoked by anyone.

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ARTICLE XII

Governing Law

12.1 Code Defined. The references herein to the Code shall be the Internal Revenue Code of 1986, as from time to time amended.

12.2 Governing Law. The laws of [NAME OF STATE LAW GOVERNING TRUST] **OR OPTIONAL** [THE STATE OF DOMICILE OF THE RECIPIENTS OR THE SURVIVING RECIPIENT] shall govern the validity and interpretation of this Agreement, notwithstanding the residence in another jurisdiction of any persons who may have an interest hereunder. However, for purposes of this Paragraph, in any conflict with Section 664 of the Code and the Regulations thereunder, that Code Section and Regulations shall govern.

12.3 Change of Situs of Trust. The original situs of the Trust created hereunder shall be [STATE]. In the exercise of the Trustee's sole and absolute discretion, the situs may be maintained in any jurisdiction as the Trustee may determine, and to which it thereafter may be transferred as selected by the Trustee. Upon any such transfer of situs, the Trust Estate may thereafter, at the election of the Trustee in its sole discretion, be governed by and administered exclusively under the laws of the jurisdiction to which it has been transferred (and subject, as required, to the exclusive supervision of the courts thereof). Accordingly, if the Trustee of the Trust created hereunder elects to change the situs of any such Trust, the Trustee of said Trust is hereby relieved of any requirement of having to qualify in any other or former jurisdiction or to file with such former jurisdiction's authorities or agencies in any manner, and of any requirement of having to account in any court of such other jurisdiction. Any change of situs of administration or change of governing law shall not affect the dispositive provisions of the Trust. References to the State of [STATE] shall then be deemed to be to that situs and jurisdiction wherever they may appear in this Trust Agreement.

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ARTICLE XIII

Trustee's Acceptance

13.1 Acceptance of Trust by Trustee. In consideration of the foregoing, the Trustee accepts the Trust thus committed to [HIM/HER/THEM/IT] and agrees to act in accordance with the terms stated above.

OPTION #1

IN WITNESS WHEREOF, the Settlors-Trustees hereby execute this Agreement on _____, 20___.

_____

[NAME], Settlor-Trustee

_____

[NAME], Settlor-Trustee

OPTION #2—TRUSTEE OTHER THAN SETTLOR

IN WITNESS WHEREOF, the Settlors and Trustee hereby execute this Agreement on _____, 20__.

_____

[NAME], Settlor

_____

_____ INITIAL

_____ INITIAL

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[NAME], Settlor

_____

[NAME OF TRUSTEE], Trustee

OR

[NAME OF ENTITY AS TRUSTEE]

By: _____

Its: _____

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IF A CHARITABLE REMAINDERMAN PROVIDES THIS TRUST INSTRUMENT TO SETTLORS, SETTLORS MUST CHOOSE ONE AND SIGN:

❑ Reviewed and approved by legal counsel for the Settlors:

Dated: _____

Signature: _____

Attorney Name: _____

Firm Name: _____

Address: _____

_____

OR:

❑ We are aware that this Trust Agreement has not been drafted by legal counsel representing us. We nevertheless have chosen to sign this Trust Agreement without having it reviewed by legal counsel retained by us.

_____

[NAME], Settlor

_____

[NAME], Settlor

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[REQUIRED FOR USE BY DONOR IN CALIFORNIA]

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California

County of _____

On _____, 20____before me, _____, Notary Public, personally appeared _____ and _____, who proved to me on the basis of satisfactory evidence to be the persons whose names are subscribed to the within instrument and acknowledged to me that they executed the same in their authorized capacity, and that by their signatures on the instrument the persons, or the entity(ies) upon behalf of which the persons acted, executed the instrument.

I certify under PENALTY of PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____ (Seal)

COMBINED INTERVIVOS TEMPLATE BASED ON TWO SETTLORS, TWO LIVES FlipCRUT
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[OTHER STATES/GENERIC—CHECK STATE LAW WHERE DONOR IS SIGNING]

STATE OF [STATE] _____

COUNTY OF [COUNTY] _____

On _____ before me, _____, Notary Public, personally appeared _____ and _____, personally known to me (or proved to me on the basis of satisfactory evidence) to be the persons whose names are subscribed to the within instrument and acknowledged to me that they executed the same in their authorized capacity, and that by their signature on the instrument the persons, or the entity upon behalf of which the persons acted, executed the instrument.

WITNESS my hand and official seal.

_____

Signature of Notary (Seal)

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SCHEDULE A

ITEMS OF PROPERTY CONTRIBUTED TO TRUST:

Accepted by the Trustees on _____, 20__.

_____

[NAME OF TRUSTEE], Trustee

_____

[NAME OF TRUSTEE], Trustee

OR

[NAME OF ENTITY OR THIRD PARTY AS TRUSTEE]

By: _____

Its: _____

COMBINED INTERVIVOS TEMPLATE BASED ON TWO SETTLORS, TWO LIVES FlipCRUT
Revised 6-2-2024

ADDENDUM FOR CHANGING THIS FLIPCRUT TEMPLATE TO A CRAT. USE THESE REPLACMENTS

ARTICLE II

Payment of Annuity Amount

OPTION #1 - TWO RECIPIENTS, JOINT AND SURVIVOR LIVES

2.1 Recipients; Trust Term. In each taxable year of the Trust, the Trustee shall pay an Annuity Amount to [RECIPIENT #1 NAME] and [RECIPIENT #2 NAME] (the "Recipients") [IN EQUAL SHARES] [JOINTLY] during their joint lifetimes, and after the death of one Recipient, wholly to the surviving Recipient, for his or her lifetime. (the "Trust Term"). The first day of the obligation to pay the Annuity Amount shall commence with the date property is transferred to the Trust as indicated by Trustee's acceptance on Schedule A.

OPTION #2 – TWO RECIPIENTS, CONSECUTIVE LIVES

2.1 Recipients; Trust Term. In each taxable year of the Trust, the Trustee shall pay an Annuity Amount to [INITIAL RECIPIENT NAME] ("the Initial Recipient") until the Initial Recipient's death, and thereafter to [SURVIVOR RECIPIENT NAME] ("the Successor Recipient") if [HE/SHE] survives the Initial Recipient, for his or her lifetime (the "Trust Term"). The first day of the obligation to pay the Annuity Amount shall commence with the date property is transferred to the Trust as indicated by Trustee's acceptance on Schedule A.

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OPTION #3 - TWO RECIPIENTS, DISCRETIONARY PAYMENTS BY INDEPENDENT TRUSTEE

2.1 Recipients; Trust Term. In each taxable year of the Trust during their joint lifetimes, the Trustee shall pay an Annuity Amount to [RECIPIENT #1 NAME] and [RECIPIENT #2 NAME] (the "Recipients") in such proportions as the Trustee in its absolute discretion determines in the taxable year, and after the death of the first Recipient, to die wholly for the lifetime of the surviving Recipient (the "Trust Term"). The first day of the obligation to pay the Annuity Amount shall commence with the date property is transferred to the Trust as indicated by Trustee's acceptance on Schedule A.

OPTION #4 - TWO RECIPIENTS, TERM OF YEARS TRUST

2.1 Recipients; Trust Term. In each taxable year of the Trust, the Trustee shall pay an Annuity Amount to [RECIPIENT NAME #1] and [RECIPIENT NAME #2] (the "Recipients") for a term of [NUMBER OF YEARS] years, ([NUMBER STATED IN MONTHS] months), (the "[NUMBER STATED IN YEARS] Year Trust Term") from the date property is first transferred to the Trust as indicated by the acceptance of property by the Trustee on Schedule A attached hereto and made part hereof, and the last day of the [NUMBER IN WORD FORM] Year Trust Term, which shall be the day preceding the [ORDINAL NUMBER OF YEARS IN TRUST TERM IN WORD FORM—E.G. TWENTIETH] anniversary of the date of first transfer, or until the date of death of the last surviving Recipient, if that occurs sooner than the expiration of [NUMBER IN WORD FORM] years.

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OPTION #5 - TERM OF YEARS TRUST FOR CLASS OF BENEFICIARIES

2.1 Recipients; Trust Term. In each taxable year of the Trust, the Trustee shall pay an Annuity Amount to a member or members of a class of persons comprised of the grandchildren of the Settlors (hereinafter collectively "the Recipients") for a term of [NUMBER OF YEARS] years, ([NUMBER STATED IN MONTHS] months), (the "[NUMBER STATED IN YEARS] Year Trust Term") from the date property is first transferred to the Trust as indicated by the acceptance of property by the Trustee on Schedule A attached hereto and made part hereof, and the last day of the [NUMBER IN WORD FORM] Year Trust Term, which shall be the day preceding the [ORDINAL NUMBER OF YEARS IN TRUST TERM IN WORD FORM—E.G. TWENTIETH] anniversary of the date of first transfer, or until the date of death of the last surviving Recipient, if that occurs sooner than the expiration of [NUMBER IN WORD FORM] years. The Trustee may pay the Annuity Amount to one or more members of the class, in equal or unequal shares, as the Trustee, in the Trustee's sole discretion, from time to time may deem advisable. The Trustee may not, however, apply any payment for the Trustee's own benefit, or in satisfaction of any support or other legal obligation of the Trustee. [**NOTE:** *THIS OPTION REQUIRES AN INDEPENDENT TRUSTEE*]

2.2 Annuity Amount. The Annuity Amount shall be equal to [NUMBER IN WORD FORM] percent ([NUMBER IN NUMERIC FORM] %) (the "Annuity Amount") of the net fair market value of the Trust assets valued as of the first business day of the initial taxable year of the Trust (the "Valuation Date").

2.3 Excess Income. Any income of the Trust for a taxable year in excess of the Annuity Amount as defined in this Article II shall be added to principal.

2.4 Frequency of Payments. The Annuity Amount to be paid under Paragraph 2.2 for the taxable year shall be paid at the end of each [MONTH/ QUARTER/ SIX

MONTHS IN EQUAL INSTALLMENTS] [YEAR] from income, or as necessary, after the close of the taxable year if made within a reasonable time. "Reasonable time" shall be as defined in Treas. Reg. sec 1.664-2(a)(1)(i)(c) and shall not ordinarily extend beyond the date required to file Form 5227, including extensions.

2.5 Proration. In determining the amounts to be paid under this Article II, the Trustee shall prorate the same on a daily basis for a short taxable year in accordance with Treas. Reg. sec. 1.664-2(a)(1)(iv)(a) and for the taxable year in which the noncharitable interests terminate in accordance with Treas. Reg. sec. 1.664-2(a)(1)(iv)(b).

[2.6 AND 3.X ARE OPTIONAL AND GO TOGETHER]

2.6 Annuity Amount After Early Distribution to Charity. After any distribution pursuant to Article III, Paragraph 3.X payment of the Annuity Amount referred to in this Article II shall remain the same as the original amount in Paragraph 2.2.

5.1 Additional Contributions.

No additional contributions may be made to this Trust after the initial contribution.

LEAVE OUT 5.2 WHICH IS USED FOR UNITRUSTS

7.7 Undervalued Remainder Interest. With respect to the initial contribution to the Trust, at the date of the contribution of property, the value of the remainder interest as determined under section 7520 of the Code (for the computation of the Settlor's or Settlors' income tax charitable deduction) must be at least 10% of the total net fair market value of the contributed transfer as defined in section 664 (d)(1)(D) of the Code for all property placed in the Trust.

7.9 Legal Incapacity of Recipient. If at any time during the term of this Trust the Recipient becomes incapacitated (under the same standards as applicable to a Trustee in Paragraph 6.4), the Trustee may apply the Annuity Amount exclusively for the benefit of the Recipient by paying it to a person holding a valid Durable Power of Attorney or a person who has been appointed conservator or guardian for the Recipient by a court of competent jurisdiction.

_____ INITIAL

_____ INITIAL

NOTES

SAVE AS BEFORE USING

RESIGNATION OF TRUSTEE

NAME OF TRUSTEE is the currently acting TRUSTEE of the NAME OF TRUST dated DATE TRUST WAS SIGNED. Pursuant to the provisions of Article VI, Section 6.2, the Trustee has the right to resign at any time by giving written notice to the beneficiaries of the trust, effective upon the appointment of a successor trustee.

> **Example -- 6.2** Right to Resign. Any Trustee shall have the right to resign at any time upon thirty (30) days written notice to the Settlor. The Trustee shall continue to act until a successor Trustee accepts the Trusteeship. Such resignation shall become effective upon the acceptance by the successor Trustee.

NAME OF TRUSTEE, hereby gives notice of resignation as Trustee as of the date indicated below and will decline to perform any further tasks as Trustee as of such date or sooner if the successor Trustee, if one is required, has accepted its role as Trustee earlier than such date, as indicated by its signature and date on this resignation under the section "Acceptance by Successor Trustee" below.

Dated: DATE

_____

NAME OF TRUSTEE, Trustee

OR IF TRUSTEE IS AN ENTITY

NAME OF ENTITY

By: _____

NAME OF OFFICER

Its: TITLE OF OFFICER

ACCEPTANCE BY SUCCESSOR TRUSTEE

NAME OF SUCCESSOR TRUSTEE hereby accepts the role of Trustee of NAME OF TRUST dated DATE TRUST WAS SIGNED as of DATE SUCCESSOR TRUSTEE TAKES

OVER and will fulfill its fiduciary duties in accordance with all of the terms of the NAME OF TRUST.

Dated: _____, 20__

_____
NAME OF SUCCESSOR TRUSTEE

OR IF AN ENTITY

NAME OF ENTITY

By: _____
NAME OF OFFICER

Its: _____
TITLE OF OFFICER

PLEASE HAVE THIS DOCUMENT NOTARIZED

ACKNOWLEDGEMENT

State of NAME OF STATE

County of NAME OF COUNTY

On DATE, before me, _____, Notary Public, personally appeared NAME OF RESIGNING TRUSTEE, who proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that she executed the same in her authorized capacity, and that by her signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

I certify under PENALTY of PERJURY under the laws of the State of NAME OF STATE that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____ (Seal)

ACKNOWLEDGEMENT

State of NAME OF STATE

County of NAME OF COUNTY

On DATE, before me, _____, Notary Public, personally appeared NAME OF SUCCESSOR TRUSTEE, who proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that she executed the same in her authorized capacity, and that by her signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

I certify under PENALTY of PERJURY under the laws of the State of NAME OF STATE that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____ (Seal)

NOTES

SAVE AS BEFORE USING

REMOVAL AND REPLACEMENT OF TRUSTEE

I/WE, NAME[S], AM/ARE the Settlor[S] of the NAME OF TRUST. Pursuant to the provisions of Article Six, Paragraph 6.3, the Settlor[S] HAS/HAVE the right to remove the Trustee or any Co-trustee at any time by written notice to the Trustee as provided in Section 6.3 as follows:

> **Example - 6.3** Right to Remove. The Settlor shall have the right to remove any Trustee or successor Trustee at any time upon written notice. Upon such removal, a successor Trustee shall be appointed pursuant to the provisions in Paragraph 6.4, and the departing Trustee shall remit all Trust records and accounts within fifteen (15) days of the date of the written notice.

NAME hereby gives notice of removal of TRUSTEE NAME as Trustee of the TRUST NAME immediately and HE/SHE/IT shall have no authority to act in any capacity on behalf of this trust as of the date below or to perform any further tasks as Trustee.

A successor Trustee has been appointed and such appointment has been accepted as indicated by HIS/HER/ITS signature and date on this Removal and Replacement of Trustee under the section "Acceptance by Successor Trustee" below as provided for in Paragraph 6.3 of the TRUST NAME.

THIS SERVES AS DEMAND TO [*NAME OF TRUSTEE]* AS REMOVED TRUSTEE TO IMMEDIATELY FORWARD BY OVERNIGHT DELIVERY SERVICE ALL TRUST RECORDS IN [*HIS/HER/ITS]* POSSESSION TO THE SUCCESSOR TRUSTEE AT [*ADDRESS OF NEW TRUSTEE]* PURSUANT TO [*HIS/HER/ITS*] AGREEMENT TO ACT IN ACCORDANCE WITH ALL TRUST TERMS UPON SIGNING THE TRUST INSTRUMENT.

Dated: DATE

_____
NAME, Settlor

OR IF ENTITY

NAME OF Settlor

By: _____
NAME

Its: TITLE OR CAPACITY

ACCEPTANCE BY SUCCESSOR TRUSTEE

NAME OF NEW TRUSTEE, hereby accepts the role of Trustee of the NAME OF TRUST as of EFFECTIVE DATE and will fulfill its fiduciary duties in accordance with all of the terms of the NAME OF TRUST.

Dated: DATE

_____
NEW TRUSTEE NAME, Trustee

OR IF ENTITY

NEW TRUSTEE NAME, Trustee

By: _____
NAME OF AUTHORIZED PERSON

Its TITLE OR CAPACITY

SAVE AS BEFORE USING

APPOINTMENT OF SPECIAL TRUSTEE
FOR
[NAME OF TRUST]

Pursuant to the provision of Article VI, Paragraph 6.10 of the NAME OF TRUST, where unmarketable assets are held by the unitrust, an Independent Special Trustee or a Qualified Appraiser is required to value the assets at the beginning of each taxable year to determine the unitrust amount for that year.

> 6.10 Unmarketable Assets. Whenever the Trust Estate includes Unmarketable Assets, or whenever the Trust acquires a deferred annuity contract of any type (hereinafter "Annuity Contract"), and where no Independent Trustee or Co-Trustee is acting, as defined in Paragraph 4.3, a Special Trustee (as defined in this Paragraph) or a successor Special Trustee may be appointed by the Trustee. The Special Trustee and any successor thereto must be an Independent Trustee as defined in Paragraph 4.3(b).
>
> 6.10 (a) Special Trustee to Make Valuations. With respect to Unmarketable Assets, the Special Trustee shall make all valuations of such Trust assets, and any other Trustee then serving shall have no power, duty, right, or obligation with respect to such valuations.

"Unmarketable Assets" and "Independent Trustee" are defined in Article IV, Paragraph 4.3 as follows:

> 4.3 Definitions:
>
> (a) Unmarketable Assets. Unmarketable assets shall mean, for all purposes of this Trust, assets other than cash, cash equivalents or other assets that can be readily sold or exchanged for cash or cash equivalents within the meaning of Regulation Section 1.664-1(a)(7)(ii).
>
> (b) Independent Trustee. Independent Trustee as defined in Reg. sec. 1.664-1(a)(7)(iii) shall mean a person or persons other than the Settlor, a noncharitable recipient, and persons no more than half of whom are "Related or Subordinate Parties" who are subservient to the wishes of the Settlor as described in Section 674(c) of the Code. Related or Subordinate Parties as used herein shall be defined pursuant to the definition in Section 672(c) of the Code.

In accordance with this requirement, I/WE hereby appoint as an Independent Special Trustee the person who has signed below. S/HE acknowledges that S/HE accepts the role and has read the provisions governing this duty in Article VI, Paragraph 6.10 and agrees to be bound by those provisions and to perform that function as described.

Reasonable compensation for this duty shall be $_____.

Dated: _____

_____
NAME, Trustee

_____
NAME OF SECOND TRUSTEE, Trustee

Accepted by: _____

Printed Name: _____

Date: _____

SAVE AS BEFORE USING

TEMPLATE LETTER TO THE TRUSTEE[S] TO CHANGE CHARITABLE REMAINDERMAN BY SETTLOR[S]

[DATE]

NAME, Trustees
NAME Charitable Remainder Unitrust
ADDRESS

Dear TRUSTEE NAME:

VERSION #1-
SETTLOR OR SETTLORS HAVE RIGHT TO CHANGE CHARITY-

Pursuant to Article III, Paragraph[S] [3.1 AND] 3.2 of TRUST NAME dated DATE, 202__, I/WE, Settlor[S], have the right to [DESIGNATE AND] re-designate charitable remaindermen at any time:

3.1 Termination of Trust. Upon the end of the Trust Term for the Recipients' noncharitable interests as described in Article II, Paragraph 2.1, the Trustee shall distribute any undesignated portion of the principal and income of the Trust, other than any amount due to the Recipient(s), free of trust to the Charitable Remainderman or Remaindermen as designated in the last specific written instrument delivered by the [SETTLOR/SURVIVING SETTLOR] to the Trustee. However, if such designation is made by the Settlor's Will, Living Trust, or other testamentary beneficiary designation, for such designation to be effective, notice of the designation must be received by the Trustee within six months of the date of death of the Settlor, and the Settlor's Will, Living Trust, or other testamentary beneficiary designation must specifically refer to the power conferred in this Paragraph 3.1. The Charitable Remainderman or Remaindermen designated shall be one or more organizations of the type described in sections 170(b)(1)(A), 170(c), 2055(a) and 2522(a)

[OPTIONAL] or an operating foundation within the meaning of section 4942(j)(3) of the Internal Revenue Code.

3.2 Distribution of Undesignated Charitable Remainder. If any amount has been left undesignated upon the termination of the noncharitable interests, whether advertently or inadvertently, the Trustee shall first distribute any designated portion of the principal and income of the Trust, other than any amount due to the surviving Recipient, free of trust to any Charitable Remainderman or Remaindermen known to be, or discovered to be, designated by any last

written instrument delivered by the [SETTLOR/SURVIVING SETTLOR] to the Trustee as provided in Paragraphs 3.1. The Trustee then, in Trustee's discretion, may distribute any remaining undesignated amount discovered in any last specific written instrument validly executed but undelivered to the Trustee to any Charitable Remainderman or Remaindermen named therein. However, if no designation has been made or is known by or discovered by the Trustee to have been made by the Settlor as to any portion of the remainder interest by the end of the six months after the date of death of the Settlor, the Trustee in its discretion shall designate as Charitable Remainderman or Charitable Remaindermen one or more organizations of the type described in sections 170(b)(1)(A), 170(c), 2055(a), and 2522(a)

[OPTIONAL] or an operating foundation within the meaning of section 4942(j)(3) of the Internal Revenue Code.

VERSION #2-
RECIPIENT OR RECIPIENTS HAVE RIGHT TO CHANGE CHARITY-

Pursuant to Article III, Paragraph[s] [3.1 AND] 3.2 of TRUST NAME dated DATE, 202__, I/WE, Recipient[s] have the right to [DESIGNATE AND] re-designate charitable remaindermen at any time:

ARTICLE III

Distribution to Charity

3.1 Termination of Trust. Upon the termination of the noncharitable interests, the Trustee shall distribute any undesignated portion of the principal and income of the Trust, other than any amount due to the Recipient, free of trust to the organization(s) appointed by the last specific written instrument delivered to the Trustee by the [RECIPIENT/ SURVIVING RECIPIENT] then entitled to current distributions from the Trust; provided, however, that if such designation is made by the Recipient's Will, for such appointment to be effective, notice of the appointment must be received by the Trustee within six months of the date of death of the Recipient and the Recipient's Will must specifically refer to the power conferred in this Paragraph 3.1. The charitable remainderman or remaindermen so appointed shall be one or more organizations of the type described in sections 170(b)(1)(A), 170(c), 2055(a) and 2522(a)

[OPTIONAL] or an operating foundation within the meaning of section 4942(j)(3)

of the Internal Revenue Code.

3.2 Distribution of Undesignated Charitable Remainder. If any amount has been left undesignated upon the termination of the noncharitable interests, the Trustee shall first distribute any designated portion of the principal and income of the Trust, other than any amount due to the Recipient, free of trust to any Charitable Remainderman or Remaindermen known to be or discovered to be designated by any last written instrument delivered by the [RECIPIENT/ SURVIVING RECIPIENT] to the Trustee as provided in Paragraphs 3.1. The Trustee then, in

Trustee's discretion, may distribute any remaining undesignated amount discovered in any last specific written instrument validly executed but undelivered to the Trustee to any Charitable Remainderman or Remaindermen named therein. However, if no designation has been made or is known by or discovered by the Trustee to have been made by the [RECIPIENT/ SURVIVING RECIPIENT] as to any portion of the remainder interest by the end of the six months after the date of death of the [RECIPIENT/ SURVIVING RECIPIENT] the Trustee in its discretion shall designate as Charitable Remainderman or Charitable Remaindermen one or more organizations of the type described in sections 170(b)(1)(A), 170(c), 2055(a) and 2522(a)

[OPTIONAL] or an operating foundation within the meaning of section 4942(j)(3) of the Internal Revenue Code.

[I/WE], the undersigned Recipient[S] hereby select the following charitable organization[S], provided [IT IS/THEY ARE] described in sections 170(b)(1)(A), 170(c), 2055(a) and 2522(a)

[OPTIONAL] or an operating foundation within the meaning of section 4942(j)(3) of the Internal Revenue Code, to receive the following shares as of the date of this written instrument indicated below:

[OMIT 170(b)(1)(A) FOR PRIVATE NONOPERATING FOUNDATIONS]

Name of Charity	Percent of Remainder

The charity or charities designated herein shall use the funds for [GENERAL UNRESTRICTED PURPOSES] [THE FOLLOWING RESTRICTED PURPOSE: FILL IN PURPOSE HERE].

The selection of charitable organizations by ME/US by means of this written instrument shall be subject to all the provisions of the NAME Charitable Remainder Unitrust,

[INCLUDING MY/OUR RIGHT TO DESIGNATE OR RE-DESIGNATE OTHER CHARITABLE ORGANIZATIONS, ALTER THE SHARES OF CHARITIES NAMED IN OR PURSUANT TO ARTICLE III, PARAGRAPH 3.2, ALTER USES BY CHARITABLE ORGANIZATIONS OR DESIGNATE OR RE-DESIGNATE ANY RESTRICTED USAGE BY ONE OR MORE CHARITIES NAMED IN OR PURSUANT TO ARTICLE III, PARAGRAPH 3.2 BY LATER WRITTEN INSTRUMENTS IN ACCORDANCE WITH ARTICLE III, PARAGRAPH 3.2.]

[**OPTIONAL**: HOWEVER, I/WE INTEND TO MAKE THIS DESIGNATION IRREVOCABLE. I/WE THEREFORE RELINQUISH MY/OUR RIGHT TO DESIGNATE OR RE-DESIGNATE OTHER CHARITABLE ORGANIZATIONS BY LATER WRITTEN INSTRUMENTS AS ORIGINALLY PERMITTED IN ACCORDANCE WITH ARTICLE III, PARAGRAPH 3.2]

In all other respects, the terms of the [NAME OF TRUST] shall remain the same and are in full force and effect.

Date: [DATE]

_____
NAME, Settlor

Date: [DATE]

_____
NAME, Settlor

OR IF BY RECIPIENT/RECIPIENTS—

Date: [DATE]

_____
NAME, Recipient

Date: [DATE]

_____
NAME, Recipient

SUMMARIES AND CITES TO IRS SAMPLE FORMS

Unitrusts:

- Inter vivos CRUT payable for 1 lifetime, Rev. Proc. 2005-52. Annotated sample declaration of trust and alternate provisions that satisfy the requirements of section 664 for inter vivos charitable remainder unitrusts that provide unitrust payments for one measured life followed by a charitable distribution of trust assets.

- Inter vivos CRUT payable for a term of years, Rev. Proc. 2005-53. Annotated sample declaration of trust and alternate provisions that satisfy the requirements of section 664 for inter vivos charitable remainder unitrusts that provide unitrust payments for a term of years followed by a charitable distribution of trust assets.

- Inter vivos CRUT payable consecutively for 2 lifetimes, Rev. Proc. 2005-54Annotated sample declaration of trust and alternate provisions that satisfy the requirements of section 664 for inter vivos charitable remainder unitrusts that provide unitrust payments for two consecutive measured lives followed by acharitable distribution of trust assets.

- Inter vivos CRUT payable concurrently and consecutively for 2 lifetimes, Rev. Proc. 2005-55. Annotated sample declaration of trust and alternate provisions that satisfy the requirements of section 664 for inter vivos charitable remainder unitrusts that provide concurrent and consecutive unitrust payments for two measuring lives followed by a charitable distribution of assets.

- Testamentary CRUT payable for 1 lifetime, Rev. Proc. 2005-56. Annotated sample declaration of trust and alternate provisions that satisfy the requirements of section 664 for testamentary charitable remainder unitrusts that provide unitrust payments for one measuring life followed by a charitable distribution of trust assets.

- Testamentary CRUT payable for a term of years, Rev. Proc. 2005-57. Annotated sample declaration of trust and alternate provisions that satisfy the requirements of section 664 for testamentary charitable remainder unitrusts that provide unitrust payments for a term of years followed by a charitable distribution of trust assets.

- Testamentary CRUT payable consecutively for 2 lifetimes, Rev. Proc. 2005-58. Annotated sample declaration of trust and alternate provisions that satisfy the requirements of section 664 for testamentary charitable remainder unitrusts that provide unitrust payments for two consecutive measuring lives followed by a charitable distribution of trust assets.

- Testamentary CRUT payable concurrently and consecutively for 2 lifetimes, Rev. Proc. 2005-59. Annotated sample declaration of trust and alternate provisions that satisfy the requirements of section 664 for testamentary charitable remainder unitrusts that provide concurrent and consecutive unitrust payments for two measuring lives followed by a charitable distribution of assets.

Annuity Trusts:

- Inter vivos CRAT payable for 1 lifetime, Rev. Proc. 2003-53. This procedure contains a sample declaration of trust that meets the requirements under section 664 of the Code and 1.664-2 of the regulations for an inter vivos charitable remainder annuity trust for one measuring life. This procedure also contains annotations to the sample trust and alternate provisions that may be integrated into the sample trust. Rev. Proc. 89-21 superseded.

- Inter vivos CRAT payable for a term of years, Rev. Proc. 2003-54. This procedure contains a sample declaration of trust that meets the requirements under section 664 of the Code and 1.664-2 of the regulations for an inter vivos charitable remainder annuity trust with a term of years annuity period. This procedure also contains annotations to the sample trust and alternate provisions that may be intergrated into the sample trust.

- Inter vivos CRAT payable consecutively for 2 lifetimes, Rev. Proc. 2003-55. This procedure contains a sample declaration of trust that meets the requirements under section 664 of the Code and 1.664-2 of the regulations for an inter vivos charitable remainder annuity trust with consecutive interests for two measuring lives. This procedure also contains annotations to the sample trust and alternate provisions that may be integrated into the sample trust. Section 4 of Rev. Proc. 90-32 superseded.

- Inter vivos CRAT payable concurrently and consecutively for 2 lifetimes, Rev. Proc. 2003-56. This procedure contains a sample declaration of trust that meets the requirements under section 664 of the Code and 1.664-2 of the regulations for an inter vivos charitable remainder annuity trust with concurrent and consecutive interests for two measuring lives. This procedure also contains annotations to the sample trust and alternate provisions that may be integrated into the sample trust. Section 5 of Rev. Proc. 90-32 superseded.

- Testamentary CRAT payable for 1 lifetime, Rev. Proc. 2003-57. This procedure contains a sample declaration of trust that meets the requirements under section 664 of the Code and 1.664-2 of the regulations for a testamentary charitable remainder annuity trust for one measuring life. This procedure also contains annotations to the sample trust and alternate provisions that may be integrated into the sample trust. Section 6 of Rev. Proc. 90-32 superseded.

- Testamentary CRAT payable for a term of years, Rev. Proc. 2003-58. This procedure contains a sample declaration of trust that meets the requirements under section 664 of the Code and 1.664-2 of the regulations for a testamentary charitable remainder annuity trust with a term of years annuity period. This procedure also contains annotations to the sample trust and alternate provisions that may be integrated into the sample trust.

- Testamentary CRAT payable consecutively for 2 lifetimes, Rev. Proc. 2003-59. This procedure contains a sample declaration of trust that meets the requirements under section 664 of the Code and 1.664-2 of the regulations for a testamentary charitable remainder annuity trust with consecutive interests for two measuring lives. This procedure also contains annotations to the sample trust and alternate provisions that may be integrated into the sample trust. Section 7 of Rev. Proc. 90-32 superseded.

- Testamentary CRAT payable concurrently and consecutively for 2 lifetimes, Rev. Proc. 2003-60. This procedure contains a sample declaration of trust that meets the requirements under section 664 of the Code and 1.664-2 of the regulations for a testamentary charitable remainder annuity trust with concurrent and consecutive interests for two measuring lives. This procedure also contains annotations to the sample trust and alternate provisions that may be integrated into the sample trust. Section 8 of Rev. Proc. 90-32 superseded.

Additional Resources

Ebook: *Charitable Remainder Trust: Mystery or Mastery? Book One: You, Your Client, the Trust* by Lynda L. Sands
https://oregonstatebar.s3.us-west-2.amazonaws.com/Seminars/2024/AEP24-2-Ebook.pdf

Forms in Microsoft Word Format:

- Exhibit 2: CRT Questionnaire
- Exhibit 7b: FlipCRUT Combined Template Based on Two Settlors-Two Lives
- Exhibit 8a: Resignation of Trustee
- Exhibit 8b: Removal and Replacement of Trustee
- Exhibit 8c: Appointment of Independent Special Trustee
- Exhibit 8d: Charity Designation Letter

https://oregonstatebar.s3.us-west-2.amazonaws.com/Seminars/2024/AEP24-2_Forms.zip

NOTES

ADVANCED ESTATE PLANNING
OREGON STATE BAR



CHARITABLE REMAINDER TRUSTS:

MYSTERY OR MASTERY?

JUNE 14, 2024

Lynda L. Sands, JD, MBA

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FIVE STEP
PLANNING PROCESS

1. MOTIVATION
2. DESIGN
3. DRAFTING
4. ASSET TRANSFERS
5. ADMINISTRATION



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WHERE YOUR MARKET COMES FROM

1 – Online research by laymen

2 – Other financial advisors

3 – Planned giving or major giving officers

4 – Your existing clients

Where does the best information come from?

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TWO DIFFERENT WAYS A CRT IS USED

TRANSACTIONALLY – One-off deal or need, generally to sell an asset at no gain
- Little or no philanthropic intent
- Often uses a long-term solution for a short-term problem/thinking

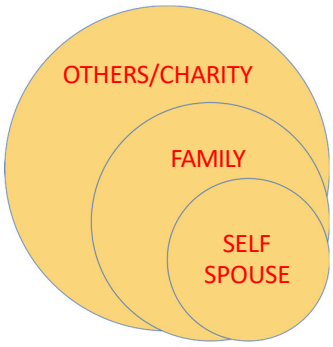
CONTEXTUALLY –In the context of financial or estate planning
- Client takes more time to learn
- Better absorption of benefits and restrictions of CRT rules

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TYPES OF MOTIVATION

STEP ONE-MOTIVATORS



POSITIVE
- NEEDS
- WANTS
- HOPES, GOALS
- DREAMS

NEGATIVE
- CONCERNS, INSECURITIES
- FEARS
- TAXES
- CONTROL/EGO
- CONTROL/DISTRIBUTION

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TYPICAL CLIENT MOTIVATORS

Income Replacement

Conversion from Non-income Producing Assets

Diversification of Portfolio

Retirement Planning

Taxes—Income Deferral, Gain Avoidance, Deduction, Tax-exempt Trust

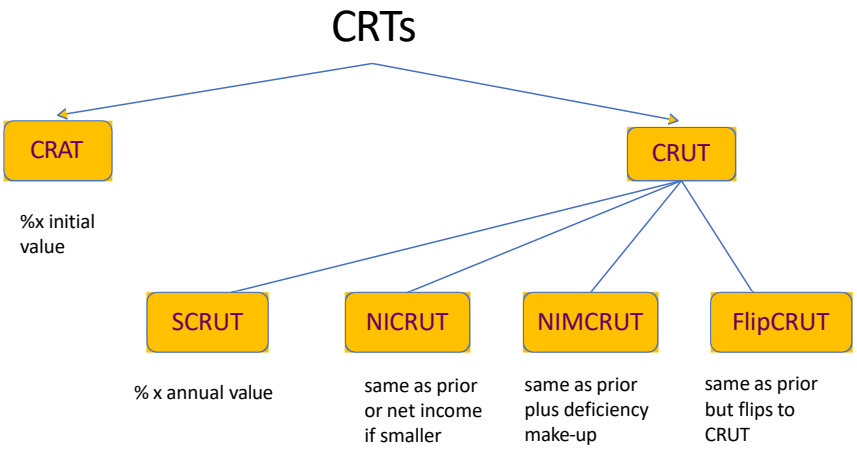
Philanthropic Planning

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STEP TWO-DESIGN: CHOICE OF TYPES OF CRT

ADD ONLY ONE FEATURE PER TRUST TYPE



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FEDERAL TAX LAW

Internal Revenue Code section 664 governs charitable remainder trusts

But most of the law is in the Treasury regulations:

1.664-1 General rules
1.664-2 Annuity Trust rules
1.664-3 Unitrust rules (all four variations)
1.664-4 Valuation of Remainder Interest rules



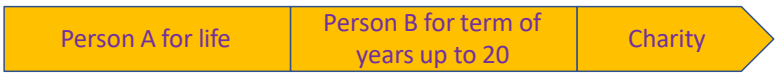
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COMMON INCOME INTEREST DESIGNS

One-life designs





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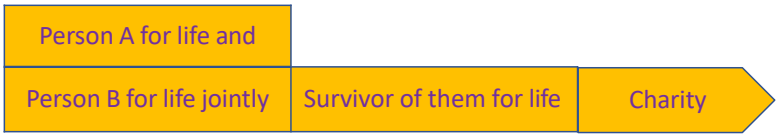
COMMON INCOME INTEREST DESIGNS

Two-lives designs

Consecutive lives



Concurrent and Consecutive Lives (Joint and Survivor)

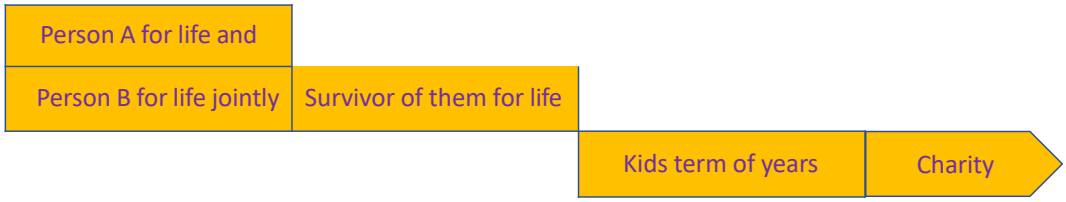


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COMMON INCOME INTEREST DESIGNS

Concurrent and Consecutive Lives (Joint and Survivor) plus term of years up to 20

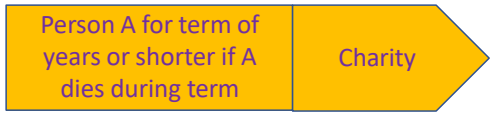


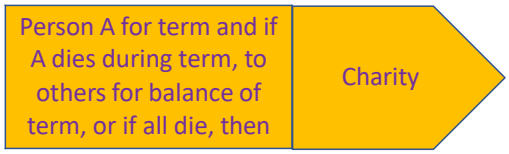
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COMMON INCOME INTEREST DESIGNS

Term of years designs





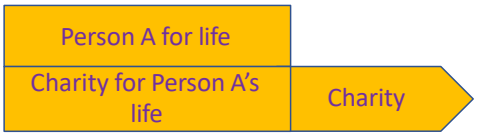
There cannot be an ongoing income interest term without a beneficiary!

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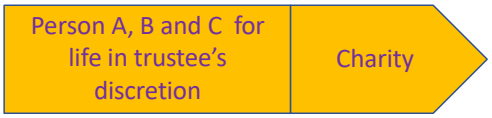
COMMON INCOME INTEREST DESIGNS

Less common designs
Share income with charity



Same or different charity

Trustee Discretion as to who gets income



C might even be a charity

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INCOME RECIPIENT ISSUES

- ✓ Loss of marital deduction by adding others—IRC 2056(b)(8) and regs
- ✓ Right to revoke successor beneficiary-by will only
- ✓ Value-driven distribution versus income earned distribution
- ✓ Concept of "unmarketable assets"
- ✓ Definition of triggering event for FlipCRUTS
- ✓ Drafting a definition of "Income" for NICRUTS, NIMCRUTS and first phase of FLIPCRUT

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DESIGNING THE REMAINDER INTEREST

§501(c)(3) Organizations

§509(a) Private Foundations	§509(a)(1)-(3)Public Charities
Nonoperating Foundation	#1--509(a)(1)-- 170(b)(1)(A)(i)-(vi) as to (vi) >33-1/3% gifts, grants
Private Operating Foundation	#2--509(a)(2)-->33-1/3% gifts, grants, sales, etc. and <33-1/3% investment Income
Conduit Foundation	
Pooled Fund Foundation	#3--509(a)(3) –Supports a charity

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TRYING TO MAKE SENSE OF IT

WHAT'S THE DIFFERENCE?



501(c)(3)	509(a), (a)(1), (a)(2), (a)(3)	170(a) (i)--(vi)
The entity does not pay income tax—(it is "tax-exempt")	It is either "private" or "public" charity	The donor can claim an Income tax deduction for gifts to it

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REMAINDER INTERESTS—ESSENTIAL CODE PROVISIONS

170(b)(1)(A), 170(c), 2522(a) and 2055(a)

VERSUS

170(c), 2522(a) and 2055(a)

POSSIBLE COSTLY DRAFTING ERROR!

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ISSUES IN DRAFTING THE REMAINDER INTEREST

Charity's legal name?
Is it a public charity?
Is it in good standing?
Vested, changeable or unnamed charity(ies)?
Alternate charity, named, default?
Restricted or unrestricted usage?
Settlor power to make early gifts from corpus?

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SELECTING A TRUSTEE

Settlor as trustee—

- ✓ 4-tier system for distributions on K-1 (See Exhibit #3)
- ✓ Valuation conflict of interest
- ✓ Engaging an independent trustee or appraiser
- ✓ Definition of "independent" 1,664-1(a)(7)(iii)
- ✓ Engaging a CRT trust administrator,or finding a knowledgeable trustee

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DESIGN ISSUES: THE CRITICAL QUARTET

Four issues you will face all the time—

- ✓ Qualified Appraiser/Appraisal & 8283, 8282
- ✓ Pre-arranged Sales
- ✓ Unrelated Business Taxable Income
- ✓ The 10% rule

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QUALIFIED APPRAISER AND APPRAISAL

Reg. Sec. 1.170A-16(d)

More than $5,000 in non-cash "unmarketable asset"

How is a "Qualified Appraisal" different than a "Certified Appraisal"?

How long to keep appraisals? "So long as relevant…"

Form 8283 woes—missing information? Loss of deduction.

RERI Holdings, LLC v. Comm'r., 149 T.C. 1 (2017) Loss of $33 Mil deduction

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PRE-ARRANGED SALES

No Sale — **Sale**

Does not depend on passage of title

Is a tax concept only

ISSUE OF CONTROL, NOT TIMING

1—Can the donee/trustee walk away from the deal?

2—Can the donee/trustee amend any term?

3—Can the donee/trustee finalize significant terms?



See handout for clients, Exhibit #6

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UNRELATED BUSINESS INCOME TERMS

UBI = Income Is Subject To Tax

UBTI = After expenses, exemptions, deductions, taxable income

UBIT = Tax on this type of income

Corporate rates, trust rates, but 100% rate for CRTs!



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UBI AND DFI

UBI = Income that is taxable

- Trade or business
- Unrelated to the charitable purpose
- Regularly carried on

DFI = Debt-financed income

- Debt incurred
- In order to acquire income-producing property
- Before, during or after acquisition

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THE HIGHLY MISUNDERSTOOD 10% RULE

Minimum 10% deduction rule
at date of gift!

Factors— To whom
For how long
In what amount
(Figured at current AFR
and frequency of payment)



Life Interest plus Remainder interest = 100% of transferred value
But charity gets 100% of Corpus at end of Trust Term

WHO GETS THIS WRONG AND WHY?

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USING THE CRT QUESTIONNAIRE FOR DRAFTING

Let's go to Exhibit # 2

Whether you use the template in Exhibit #7,
or Wealth Counsel, Lexis-Nexis or your firm's templates,
this will save you time, educate your client, and make sure
you don't miss issues.

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STEP THREE--DRAFTING THE CRT

Let's go to Exhibit #7

This is a Two-Settlor, Two-Trustee, Two-Beneficiaries concurrent and consecutive lives template for a FlipCRUT

It contains many optional clauses from which you can choose

We will use the subtraction method for drafting



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STEP FOUR—TRANSFERRING ASSETS

You transfer assets all the time in your practice
Here are some issues to watch with CRT clients:

- ✓ Incomplete records
- ✓ Undisclosed entities
- ✓ Hidden pre-arranged sales
- ✓ Costs of sale and investments –setting payout rate
- ✓ Carrying costs before trustee sells property
- ✓ Title/No title –recordation, registration, no transfer document
- ✓ Not only debts, but also liens and encumbrances (UBI, grantor trust)

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STEP FIVE—ADMINISTRATION ISSUES

- Getting EIN online
- Banking and investment accounts
- Four-tier system setup
- Self-dealing
- UBIT
- Grantor trust
- 10% rule for additional contributions
- Over and under valuations
- Independent Special Trustee
- Reformation
- Trust Adminstrator

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ANALYSIS OF SELF DEALING

1.Is there a disqualified person (DQP)?

Yes, go to (2)

No, stop here, there is no self dealing

2. Is there an exemption from DQPstatus under IRC sec. 4946?

Yes, stop here, no self dealing

No, go to (3)

3.Is there an act of self-dealing?

Yes, go to (4)

No, stop here, no self dealing

4.Is there an exception under the 4941 regulations for this act?

Yes, then no self dealing

No, there IS self dealing, and reporting and excise penalty tax

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REFORMABLE CRTS

What qualifies as a "reformation"? IRC 2055(e) Not a state law modification!

1. Amendment signed by parties if state law accepts it as binding
2. Construction (court interpretation reconstruction of document)
3. Reformation proceedings (petition to court based on mistake of fact or law in the drafting) Also— Scrivener's Error allowance per private letter rulings
4. Otherwise (whatever might be binding under state law)

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POST-ADMINISTRATION: TERMINATION OF CRT

Regular

Last regular payment
Prorated to end of term



Early

Sale of income interest
Gift of income interest
Gift of income interest for CGA
"Split and Quit" actuarially
Revocation of survivor's interest
Qualified contingency happens

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THE END



BE SURE TO READ THE OUTLINE FOR DETAILS ON THESE PPTs!

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NOTES

Chapter 3

Presentation Slides: Wills and Won’ts: Navigating the Ethical Tightropes of Estate Planning

David Elkanich
Buchalter
Portland, Oregon

NOTES

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Oregon State Bar

Wills and Won’ts: Navigating the Ethical Tightropes of Estate Planning

David Elkanich
Email: delkanich@buchalter.com

Oregon State Bar
Advanced Estate Planning 2024
June 14, 2024
11:20 – 12:20 PM

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Today’s Agenda

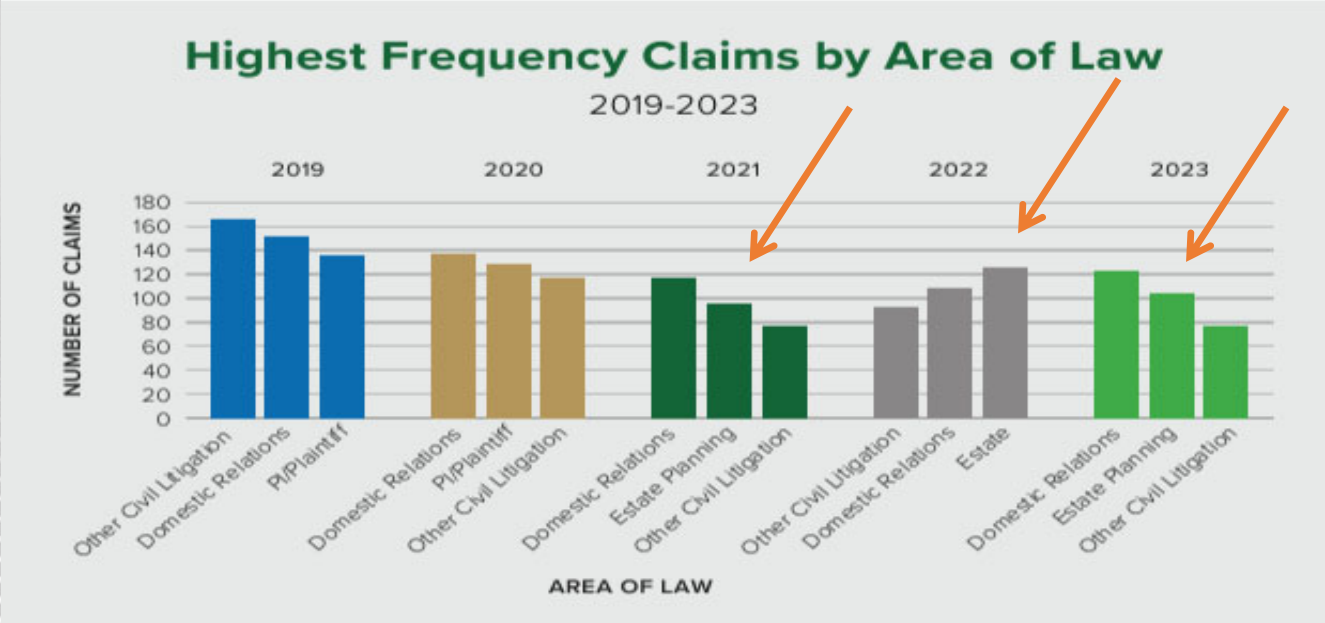
- Risk Management
- Conflicts of Interest
- Diminished Capacity
- Confidentiality and Release of the Client File
- Other?

- Oregon

- Questions

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But First...Risk Management



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Why is this?

- Population is aging and T&E is a growth area
- Complexity of estate planning
- Changes in legal standards/3d party claims
- Lack of communication
- Negligent discovery
- Competency/not familiar with T&E law
- Conflicts of interest

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And Difficult "Red Flag" Clients

- Trail of past lawyers
- Unreasonable client expectations
- Client by committee
- Outside practice areas
- The "everybody else's fault" client
- The "doing it for the principle of it" client
- The "win at all costs client" client
- The helper and the nagging clients
- The non-responsive or last-minute client
- What else?



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Hypothetical

- Attorney Meena is an experienced estate planning lawyer. She is approached by John, the patriarch of the Smith family, to draft a comprehensive estate plan. During the initial meeting, John mentions that he wants his children, Alice and Bob, to be involved in the process to ensure family harmony and transparency. As the planning progresses, John suggests that his second wife, Cheyenne, also join the discussions, given her interest in the family's assets. Meena agrees to talk with everyone in creating the estate plan.

- Who does Meena represent? Why?
- Who *should* she represent? Why?

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Who Is The Client?

Subjective:

Did the person believe you were his or her lawyer?

Objective

Was that belief objectively reasonable?



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An Engagement Letter = Exhibit "A"

- What would you want to see in an engagement letter?
  - — Client identification
  - — Define the scope of the representation
  - — Address fees, changes to fees and retainer refreshment
    - avoid involuntary pro bono work
  - — Other elements to consider
- Other letters:
  - — Scope letters
  - — Non-engagement letters
  - — End of engagement letters

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Defining the Client and the Representation

- Grandfather passes away a few months ago and another law firm in town handles the matter. Granddaughter thereafter hires you to challenge Grandfather's will.
- Last night – you received an unsolicited email from Grandfather's, asking you to represent her in what she expects will be a lawsuit by Granddaughter challenging the will. The email provided some confidential information about the Grandfather that would be useful in the lawsuit you plan to file on behalf of Granddaughter.

- 1. Who is your client?
- 2. May you tell Granddaughter about the email she received?
- 3. May you continue to represent Granddaughter?

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RPC 1.18 – Duties to Prospective Clients

- Generally, owe duties of confidentiality and some loyalty
- Conflict if: "same or substantially related matter" and information learned could be "significantly harmful"

- Options:
  - —Consents
  - —Disclaim duties
  - —Timely screen

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What About the Email?

- "We believe . . . that there is a vast difference between the unilateral, unsolicited communication at issue here by a prospective client to a law firm and a communication made by a potential client to a lawyer at a meeting in which the lawyer has elected voluntarily to participate and is able to warn a potential client not to provide any information to the lawyer that the client considers confidential."

- See NY City LEO 2001-1 (3/1/01)
- See also San Diego LEO 2006-1 (2006)

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Conflicts and Joint Representation

- Husband and Wife are both in their second marriage.
- Husband and Wife are intelligent, experienced in business, and independently wealthy.
- Husband and Wife ask Lawyer to represent them jointly with regard to their estate plan.

- QUESTION: Is it permissible for Lawyer to represent Husband and Wife with proper disclosure and consent?

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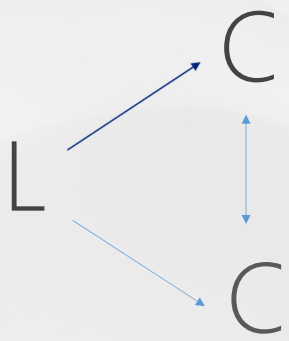
- Why should you care about conflicts?
  - —Discipline
  - —Disqualification
  - —Expensive replacement counsel
  - —Fee disgorgement
  - —Leading cause of malpractice claims
  - —Involuntary pro bono

- American Collect of Trust/ Estate Counsel Commentaries 1.7:
  - —A lawyer who is asked to represent multiple clients regarding related matters must consider at the outset whether the representation involves or may involve impermissible conflicts, including ones that affect the interests of third parties or the lawyer's own interests.

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Direct Adversity Conflict – RPC 1.7(a)(1)

- Representation of one client in any matter adverse to another client of the firm
  - —Relationship between the matters is irrelevant



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Material Limitation Conflict – RPC 1.7(a)(2)

- Significant risk that representation of one client will be materially limited by responsibilities to another client or a personal interest of the lawyer (or a former client).
  - —Exs. Co-defendants, related cases
  - —Confidential info of former clients
  - —Personal interest of lawyer – e.g., financial interest, bar complaint, malpractice allegation, etc.

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How to Obtain Effective Informed Consent?

- Make it informed:
  - —Communicate adequate information and explanation about material risks of and reasonably available alternatives to the proposed course of conduct.
- It must be confirmed in writing (but get the client to sign):
  - —Recommend the client seek independent legal advice to determine if consent should be given. They don’t have to – but it is up to them.
- When and how:
  - —Spell things out, put it in writing, get signatures where you can.
  - —Clearly identify the consents being sought
  - —Clearly identify why the client should care
  - —Obtain or transmit within “reasonable time”

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- Answer: Mostly yes. See Oregon Ethics Opinion 2005-86.

- Examples:
  - —Spouses may disagree on distribution.
  - —One spouse may want to avoid bankruptcy (by asserting that all debts at issue were solely those of the other spouse).
  - —One or both spouses may have children from prior marriages. See, e.g., In re Plinski, 16 DB Rptr 114 (2002) (husband and wife, who each had adult children from previous marriages, had interests that were adverse because value of their respective estates were substantially different, clients disagreed over distribution of assets, and wife was susceptible to pressure from husband on financial issues).

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But Wait! OSB Op 2018-194 – Elective Share

- 1. May Lawyer provide information to Married Couple as to their respective elective share rights under ORS 114.600 to 114.725?
  - —[yes]
- 2. May Lawyer advise both Spouse A and Spouse B as to whether they should waive their elective share rights as provided in ORS 114.620(1)?
  - —[no, qualified]
- 3. May Lawyer prepare an agreement to mutually waive the elective share rights of Married Couple?
  - —[no, qualified]
- 4. After Spouse A and Spouse B have executed an agreement to waive the elective share, may Lawyer advise Married Couple concerning their estate plan?
  - —[yes]

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What Should You Consider in Joint Reps?

- When a conflict may arise. Provide notice if you can / what happens.
- Confidentiality – the "no secrets" rule.
  - —See ABA cmt [31] to ABA RPC 1.7:
  - —The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other.
- Have you ever heard: "Don't tell my spouse, but…"
- Exception – in litigation between the two. OEC 503(4)(e)

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Hypothetical

- Asher Attorney agrees to represent Molly and Jim in their formation of company. A few months later, the company is in business with Molly and Jim as 30/30 shareholders. Their adult children, John & Paul (Molly's kids) and George and Ringo (Jim's kids), each own 10%. Molly is CEO and Jim is CFO and they sit on the company's Board with the four kids. Once formed, Asher continues to represent the company with respect to all of its legal needs. If Asher can't handle a matter, he sends it to one of his firm partners. Over the next year, the company takes off, Molly and Jim are making gobs of money, and Asher is busy fielding calls as the "go to" lawyer for Molly, Jim, and their kids. One of Asher's partners does everyone's estate plans, and another partner represents Molly separately on a side business.

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The "Family" Lawyer

- The difficulty of being the "family" lawyer
- ABA RPC 1.7 cmt [27]:
- "[C]onflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved."

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Former Client Conflicts

- Lawyer previously represented Wife and Husband in family estate planning matters. Wife now has asks Lawyer to represent her in the dissolution of the parties' marriage. Neither Husband nor Wife is still a current client of Lawyer.
- QUESTION: May Lawyer undertake the representation of Wife against Husband in the dissolution proceedings?
- See OSB Formal Ethics Op. 2005-148 [Revised 2014]

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Former Client Conflict – RPC 1.9

- Same or substantially related matter in which that person's interest are materially adverse to the interests of the former client
  - —Matter-specific conflicts
  - —Information-specific conflict
- Always waivable
- Former client conflicts survive death. *In re Hostetter*, 348 Or 574 (2014)
- Cf. ABA Formal Ethics Op No 05-434 (absent additional factors, there is no conflict in representing testator in disinheriting beneficiary who is also client, because testator is free to change will at any time).

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Confidentiality, Diminished Capacity, and the Client File

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Hypo:

- Sheila has represented Edgar in estate planning for a few years. Edgar named his daughter as the PR of his estate and Edgar has expressed concern about his son, who Edgar does not want in control of his estate. Edgar is getting older and in the last visit with Edgar and his daughter, Edgar did not appear to have capacity. One week later, Sheila receives an email from Anthony, who indicates he has been retained to represent Edgar and provides a release for the entire estate planning file. The same day, Edgar's daughter calls Sheila to express concerns because she learned that brother took Edgar to Anthony for new estate documents.

- What should Sheila do?

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- RPC 1.6(a): A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent ***
  —(b)(5): to comply with a court order

- OSB Formal Ethics Op. 2017-192
- Client file = the sum total of all documents, records, or information (either in paper or electronic form) that the lawyer maintained in the exercise of professional judgment for use in representing the client.

- Absent viable attorney lien, obligated to produce entire file to client unless an exception exists.

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Diminished Capacity

- Impairment disrupts the normal attorney-client relationship
- How do we define incapacity?

- Two questions in every representation:
  - —Does client have capacity to contract for services?
  - —Does client have the capacity to complete the matter?

- Can we assume competency?
  - —See Schafer v. Schaefer, 183 Or App 513 (2002) (presumption of competency)

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- ABA RPC 1.14 cmt [6]
  - —In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

- https://www.americanbar.org/groups/law_aging/resources/capacity_assessment/

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- Attempt to maintain a normal relationship
  - —RPC 1.14(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
  - —Advise, and resist temptation to decide for clients
- Duty of communications is “heightened”

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- May need to take protective action. See RPC 1.14:
  - —(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.
  - —(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

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- Protective measures:
  - —Consulting with family members
  - —Using voluntary surrogate decisionmaking tools – powers of attorney, etc.

- Least restrictive means necessary
  - —Guardianship should be pursued only when serious harm is imminent, intervention is necessary, no other ameliorative development is foreseeable, and nonlawyers would be justified in seeking guardianship.
  - — Particular care should be taken when requesting appointment of a guardian ad litem in a juvenile dependency case or termination of parental rights case because of the significant liberty interest at stake. OSB Formal Opinion No. 2000-159.

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David J. Elkanich
Buchalter, PC
Mobile: 503-367-4227
delkanich@Buchalter.com
X: @DavidElkanich

David J. Elkanich is the Office Managing Shareholder in Buchalter's Portland office, and Chair of the Firm's Professional Responsibility Group.

Mr. Elkanich focuses his practice primarily on legal ethics, risk management, and discipline defense. He advises lawyers, law firms, in-house legal departments, as well as students and other professionals, on a variety of ethics issues, including conflicts of interest, confidentiality, fee disputes, internal investigations, law firm dissolutions and partnership disputes, malpractice and professional liability cases, and litigation issues, such as withdrawal and disqualification motions.

David is an adjunct professor at Lewis & Clark Law School, where he has taught ethics since 2012. He received his J.D. from the University of Oregon School of Law and his B.A., magna cum laude, from the University of Arizona.

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Chapter 4

Use It or Lose It—Planning for the 2026 Exemption Sunset

John Draneas
Draneas Huglin Dooley LLC
Lake Oswego, Oregon

Ian Richardson
Gleaves Swearingen LLP
Eugene, Oregon

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NOTES

USE IT OR LOSE IT

Planning for Sunset of Estate/Gift Tax Exclusion Amount in 2026

John Draneas and Ian Richardson, November 14, 2023

I. What Happens in 2026?

A. Development of the law.

1. The 2001 Economic Growth and Tax Relief Reconciliation Act (EGTRRA) provided for increasing exemption amounts that culminated in the outright repeal of the estate tax in 2010. However, it was then to return in 2011 with an exemption of $1 million and graduated rates reaching a top rate of 55% on transfers over $3 million. The Tax Relief, Unemployment Insurance Authorization, and Job Creation Act of 2010 (TRA 2010) reinstated the estate tax retroactively to 2010 but gave estates of decedents who died in 2010 the option of estate tax elimination in exchange for carryover basis, and created portability. The 2012 American Taxpayer Relief Act made TRA 2010 permanent, with a new exclusion amount of $5 million in 2011, adjusted for inflation annually thereafter.

2. The 2017 Tax Cuts and Jobs Act (TCJA) increased the gift, estate and generation skipping tax exclusion amount, roughly doubling it, to nearly $12,920,000 in 2023. It is estimated to increase to $13,610,000 in 2024.

3. Due to Senate budget rules, the TJCA could only remain in effect for 10 years. It must end, or "sunset" (be eliminated), at the end of 2025, when we'll return to the TRA 2010 exclusion amount, which will increase for inflation, but using a different adjustment rate, through 12/31/25. Current estimates for the 2026 exclusion range from $6.2 million to nearly $7 million. We use $7 million for our discussion.

4. We refer to the elimination of the TCJA 2017 rules as "sunset," and the times before and after sunset as "pre-sunset" and "post-sunset" (respectively).

B. DSUE. ATRA 2012 introduced the concept of portability. Since then, a deceased spouse's unused federal estate tax exemption (DSUE) transfers, or ports, to the surviving spouse. Sunset does not affect this. If the deceased spouse dies before sunset, the surviving spouse retains the full amount of the DSUE even after sunset. For example, if a spouse dies in 2024 and leaves everything to the surviving spouse, the surviving spouse's 2026 exemption should be about $20.6 million.

C. Use it or Lose It.

1. If the estate tax exemption is going to go down in 2026, the "Use it or lose it" strategy involves making gifts before the change in order to use the currently high exemption. The exemption applies to either gift or estate tax.

2. Of course, those clients whose estates will always be below the 2026 exemption have no cares about the sunset. Losing an exemption they would never be able to use is of no consequence to them.

3. But then we have the clients whose might ultimately exceed the 2026 exemption amounts. They may or may not want to use their exemptions before losing them.

D. Detailed explanation of "sunset" rules, with illustration.

1. The change at "sunset" is not a change in the way estate tax is calculated, it is only a change in one number used in the estate tax calculation: the "basic exclusion amount," meaning the amount of value that can be passed free of estate tax. Under Sec. 2010(c)(3)(C): pre-sunset, the exclusion amount is $10 million, indexed for inflation from 2010; post-sunset, the exclusion is $5 million indexed from 2010. For purposes of these materials we'll assume that under Sec. 2010(c)(3)(C) the applicable exclusion amount as of December 31, 2025 will be $14,000,000, and $7,000,000 as of January 1, 2026.

2. To illustrate the effect of sunset, let's first compare sample estates pre-sunset and post-sunset. Again, sunset changes only one number – the basic exclusion amount (shown as row 7 in the tables below), which results in changing the "applicable credit amount" (shown as row 9 in the tables below). Recall that Under Sec. 2010(a) each estate is entitled to an estate tax credit, and that under Sec. 2010(c)(1) the applicable credit amount is the estate tax credit amount necessary to effectively exempt the basic exclusion amount from the estate tax (in our table below row 9 is the amount of federal estate tax that would be payable on an estate with a federal tax base equal to the amount shown on row 7, calculated as if no exclusion applied).

TABLE 1:

	Death 12/31/2025, No Taxable Gifts			
1.	Gross Estate	$7,770,348	$16,074,405	$20,000,000
2.	Oregon Estate Tax	$770,349	$2,074,405	$2,702,500
3.	Federal Taxable Estate (1-2)	$6,999,999	$14,000,000	$17,297,500
4.	Taxable Gifts	$0	$0	$0
5.	Federal Tax Base (3+4)	$6,999,999	$14,000,000	$17,297,500
6.	**Federal Tax on Base** ($345,800 +40% of tax base amount over $1 million)	**$2,745,800**	**$5,545,800**	**$6,864,800**
7.	*Applicable Exclusion Amount*	*$14,000,000*	*$14,000,000*	*$14,000,000*
8.	DSUE	$0	$0	$0
9.	**Applicable Credit Amount on Applicable Exclusion + DSUE** ($345,800 + 40% of tax base + DSUE over $1 million)	**$5,545,800**	**$5,545,800**	**$5,545,800**
10.	**Net Federal Estate Tax** (6-9, minimum of $0)	**$0**	**$0**	**$1,319,000**

TABLE 2:

	Death 1/1/2026, No Taxable Gifts			
1.	Gross Estate	$7,770,348	$16,074,405	$20,000,000
2.	Oregon Estate Tax	$770,349	$2,074,405	$2,702,500
3.	Federal Taxable Estate (1-2)	$6,999,999	$14,000,000	$17,297,500
4.	Taxable Gifts	$0	$0	$0
5.	Federal Tax Base (3+4)	$6,999,999	$14,000,000	$17,297,500
6.	**Federal Tax on Base** ($345,800 +40% of tax base amount over $1 million)	**$2,745,800**	**$5,545,800**	**$6,864,800**
7.	*Applicable Exclusion Amount*	*$7,000,000*	*$7,000,000*	*$7,000,000*
8.	DSUE	$0	$0	$0
9.	**Applicable Credit Amount on Applicable Exclusion + DSUE** ($345,800 + 40% of tax base + DSUE over $1 million)	**$2,745,800**	**$2,745,800**	**$2,745,800**
10.	**Net Federal Estate Tax** (6-9, minimum of $0)	**$0**	**$2,800,000**	**$4,119,000**

3. As the tables illustrate:

    a. for an Oregon estate under $7.77 million sunset produces no change;

    b. an Oregon estate up to $16 million would pay no federal estate tax pre-sunset, but would pay $2.8 million federal tax post-sunset – it's a $2.8 million question;

    c. Oregon estate tax impacts the amount of federal estate tax (because the federal tax base is calculated by deducting the amount of Oregon estate tax).

4. DSUE and Portability.

    a. The estate of a surviving spouse is entitled to apply, in addition to the surviving spouse's own basic exclusion amount, the deceased spouse's unused exclusion amount (DSUE) that is formally ported by election to the surviving spouse. The sum of the surviving spouse's basic exclusion amount in effect at the time of the surviving spouse's death, and the deceased spouse's DSUE, may be used to calculate the applicable credit amount used in the deceased spouse's estate. See Regs. 20.2010-2. The Treasury regulations provide that a pre-sunset DSUE amount is not reduced by sunset – the entire amount of the DSUE as elected in the deceased spouse's estate tax return may be used by the surviving spouse for estate and gift tax purposes, without adjustment as a result of sunset.

    b. Consider a pre-sunset DSUE, as applicable to a surviving spouse dying pre-sunset as compared to post-sunset.

TABLE 3:

		Death 12/31/2025	Death 1/1/2026
1.	Gross Estate	$20,000,000	$20,000,000
2.	Oregon Estate Tax	$2,702,500	$2,702,500
3.	Federal Taxable Estate (1-2)	$17,297,500	$17,297,500
4.	Taxable Gifts	$0	$0
5.	Federal Tax Base (3+4)	$17,297,500	$17,297,500
6.	**Federal Tax on Base** ($345,800 +40% of tax base amount over $1 million)	**$6,864,800**	**$6,864,800**
7.	Applicable Exclusion Amount	$14,000,000	$7,000,000
8.	DSUE (pre-sunset death)	$10,000,000	$10,000,000
8.a.	*Applicable Exclusion + DSUE (7+8)*	*$24,000,000*	*$17,000,000*
9.	**Applicable Credit Amount on Applicable Exclusion + DSUE** ($345,800 + 40% of tax base + DSUE over $1 million)	**$9,545,800**	**$6,745,800**
10.	**Net Federal Estate Tax** (6-9, minimum of $0)	**$0** **(-$2,681,000)**	**$119,000**

4. Again: who cares?

    a. Sunset does not affect Oregon taxpayers whose federal estates, net of deduction for Oregon tax, will be under the adjusted exclusion amount at death. If the assumed exclusion amount in 2026 is $7 million, that's $7,770,348 for an Oregon estate (based on our assumptions about inflation adjustments).

    b. Any DSUE amount would increase the amount of exclusion available to the surviving spouse, thereby increasing the threshold for "caring" about it – as shown above, a surviving spouse with a $10 million DSUE will need to have an estate in excess of $17 million at death, post-sunset, to care about the effect of sunset.

5. Gift Tax Rules.

    a. Gifts made pre-sunset are sheltered by the pre-sunset exclusion amounts: a taxpayer could gift up to $14,000,000 (cumulative lifetime taxable gifts) in 2025 without paying any gift tax.

    b. Gifts made post-sunset are sheltered by the post-sunset exclusion amount: a taxpayer could gift up to $7,000,000 in 2026 without paying tax, assuming no prior taxable gifts (pre-sunset gifts used would simply reduce the amount of exclusion remaining post-sunset, by the amount of the exclusion used by the pre-sunset gifts).

    c. Any DSUE ported to the taxpayer increases the amount of taxable gifts that can be made without paying tax.

d. But, how do pre-sunset gifts effect estate tax liability upon a post-sunset death? Can pre-sunset gifts be used to "preserve" increased exclusion amount? The intersection of taxable gifts and estate tax returns is more fully explained below, and that's the "use it lose it part."

E. Clawback.

1. As written, Sec. 2010(c)(3)(C) effectively eliminates the increased gift tax exclusion for deaths occurring after sunset, by limiting the decedent to the post-sunset exclusion amount, and by including the prior taxable gift as part of the federal tax base. If we look at our previous examples of a post-sunset estate, we'll see that on the post-sunset illustration any pre-sunset gifts would be included and would therefore increase the federal tax base, and that the applicable exclusion amount is reduced. Where is the exclusion amount in effect at the time of the prior gifts reflected? It isn't, the taxpayer must die before 1/1/2026 to take advantage of the higher exclusion in effect at the time of the prior gifts. This is what has been referred to as the "clawback" problem: if a taxpayer makes pre-sunset gifts when the exclusion amount is higher, but then dies post-sunset when the exclusion amount is lower, will the change in exclusion amount "claw back" any savings under the pre-sunset exclusion amount?

2. Sec. 2001(g)(2) instructed the Treasury to create regulations to address the impact of post-sunset exclusion amounts on pre-sunset gifts. The Treasury responded with Regs. 20.2010-1(c). Those regulations effectively eliminate the "clawback" problem, and allow taxpayers to calculate the effective exclusion amount at death as the greater of (i) the post-sunset exclusion amount effective at the time of death or (ii) the exclusion amount used by pre-sunset gifts.

3. Following is an illustration showing the effect of pre-sunset taxable gifts on the estate tax liability of a post-sunset estate, using an estate (including gifts) of $20 million, comparing $7 million of pre-sunset gifts to $14 million of pre-sunset gifts.

4. To avoid losing some of it, you have to use all of it. The maximum applicable credit amount pre-sunset will be $5,545,800, based on an applicable exclusion amount of $14,000,000. To preserve all of that credit amount for a post-sunset estate, the taxpayer would have to make pre-sunset taxable gifts of $14,000,000.

5. A pre-sunset DSUE increases the amount of gifts that a surviving spouse must make in order to utilize their pre-sunset exclusion amount, by the DSUE amount.

TABLE 4A (death 1/1/2026, $7 million gift vs $14 mil gift):

1.	Gross Estate	$13,000,000	$6,000,000
2.	Oregon Estate Tax	$1,582,500	$542,500
3.	Federal Taxable Estate (1-2)	$11,417,500	$5,457,500
4.	Taxable Gifts	$7,000,000	$14,000,000
5.	Federal Tax Base (3+4)	$18,417,500	$19,457,500
6.	**Federal Tax on Base** ($345,800 +40% of tax base amount over $1 million)	**$7,312,800**	**$7,728,800**
7.	Pre-Sunset Gifts	$7,000,000	$14,000,000
8.	Exclusion Amount Used by Pre-Sunset Gifts (in excess of any DSUE)	$7,000,000	$14,000,000
9.	***Credit (non-DSUE) Used by Pre-Sunset Gifts*** *($345,800 +40% of exclusion over $1 million)*	***$2,745,800***	***$5,545,800***
10.	Basic Exclusion at Death	$7,000,000	$7,000,000
11.	***Credit on Basic Exclusion at Death*** *($345,800 + 40% of tax base over $1 million)*	***$2,745,800***	***$2,745,800***
12.	DSUE Amount	$0	$0
13.	**Credit Amount on Basic Exclusion (*greater of 9 and 11*) + DSUE ($345,800 + 40% of tax base + DSUE over $1 million)**	**$2,745,800**	**$5,545,800**
14.	**Federal Estate Tax** (6 – 13)	**$4,567,000**	**$2,183,000**

TABLE 4B:

15.	Federal Estate Tax Without Gifts (see table above)	$4,119,000	$4,119,000
16.	*Federal Estate Tax Saved*	*($448,000)*	*$1,936,000*
17.	*Oregon Estate Tax Saved	$1,120,000	$2,160,000
18.	*Federal Estate Tax Increase from Reduced Oregon Tax Deduction	$448,000	$864,000
19.	***Net Oregon Tax Saved*	$672,000	$1,296,000

II. Will the 2026 law change actually go into effect?

A. Recall 2012, when we were all scrambling to use our clients' exemptions before the exemptions dropped to $1 million in 2023. Will congress do that again, and extend the 2017 TCJA exclusion amounts past 2026, or otherwise avoid sunset?

B. Predictions all political, much depends on who is in control of congress and the presidency. Will the 2026 changes take effect?

1. Yes: if Democrats have a veto on new legislation it probably won't happen; doing nothing is what congress does best now.

2. No: look at what Obama did, if the Democrats can trade an income tax increase for an estate tax extension they may do it; but that would require passing meaningful legislation, and passing meaningful legislation seems beyond this congress' abilities.

C. Byrd rule.

D. Revenue effect.

III. Practical problems with using gifts to preserve pre-sunset exclusion.

Assuming that 2026 actually happens as intended, what can taxpayers do about it now? That is, should they "use it or lose it" by making gifts prior to sunset.

A. First reaction – make some gifts while you have a larger exemption. Unfortunately, small gifts don't have any effect on post-sunset estate tax – you have to go big, as noted above, starting at $7 million to use any, up to $14 million to use it all.

B. So: we can classify taxpayers into at least 3 groups:

1. Don't care at all (under $ 7/14 million, individual/married couple). They won't have any tax under any circumstances. The "unwealthy."

a. Since they don't care, they won't make gifts.

2. Can take full advantage (over $14/28 million). The "wealthy."

a. They can afford to max out their gifts, and preserve all of their pre-sunset exclusion amounts, if their estates are sufficiently greater than $14/28 million.

3. Care but can't take full advantage of it (between $7/14 million and $14/28 million). They face estate tax, but can't avoid it because they would be impoverished. The "great middle."

a. They face an increased estate tax after 2025, but can't fully preserve it because they would be impoverished – they would have to give away their entire estates in order to to fully preserve their pre-sunset exclusions.

b. How can taxpayers in the "great middle" address the problem noted above? Is there a way to give it away but keep access to it, or otherwise retain sufficient value? Can "middle" taxpayers have their cake and eat it too? More on this question below.

4. Other factors to consider in making pre-sunset gifts include:

a. future asset growth (high growth assets that may push the client into a higher estate tax group above);

b. valuation discounts (fifty percent valuation discounts on gift assets, for example, could in a sense double the gift thresholds, as compared to liquidation values);

c. life expectancy, inflation growth, estate depletion (how much does a taxpayer need to retain for lifetime use?).

IV. <u>Gift strategies.</u>

A. Upside of gifts:

1. may be able to preserve pre-sunset exclusion;
2. gifts "leverage" future growth after date of gift;
3. Gifts avoid Oregon estate tax;
4. GTR is better place to structure/defend valuation than ETR;

B. Recognize the downsides of gifts:

1. Retaining enough for needs – gifted assets are gone.
2. Loss of basis step-up at death (10-16% estate tax on assets vs. 33.8% income tax on gain):
   a. no problem for wealthy, as their estate tax will always be higher than their income tax;
   b. major problem for the Great Middle, as their income tax rates should be higher than their estate tax rates.
3. By reducing Oregon estate tax deduction, gifts create larger Federal taxable estate (but should always net an estate tax savings).
4. So: look for "low hanging fruit" – high basis, high growth potential (including as result of discounts), don't need for living expenses or income, won't go to charity.

C. Techniques that may work as compromise.

1. SLATs. How you can "have your cake and eat it too."
   a. Non-reciprocal cross SLATs. See checklist and memo at end of materials. See also for example PLR 200426008.
   b. Maybe do just one SLAT for gifts by one spouse, and non-SLAT for gifts by the other spouse; one spouse would have no beneficial interest, but that may be acceptable, depending on wealth (better for the "wealthy" taxpayers).
   c. If one spouse does not have sufficient assets to use for gifts, but the other spouse has excess gift assets, shift assets now to "season" them before 2025 gifts.
2. GRATs.
3. Grantor trusts, role of "defective" grantor trusts, and use of "swap" powers.

D. Hedge planning.

Congress has a recent history of passing tax legislation at the last minute. Tax planning care rarely be accomplished at the last minute. What if congress does something at the last minute to avoid sunset, or even after the last minute as they did in 2012 (ATRA)? Also recall the capital gains tax "scare" at the end of 2021. Are there for ways to create effectively optional/contingent gifts the address the risk congress extends the higher exclusion amounts shortly before or even after (possibly retroactively) after 12/31/2025?

Disclaimers?

Powers of appointment?

Other techniques?

NON-RECIPROCAL SLAT CHECKLIST:

John Trust	**Jane Trust**
Date of Creation – December 27, 2012	**Date of Creation –** December 31, 2012
Distributions During Lifetime: • All income must be distributed • Principal can be distributed as needed for maintenance of standard of living • An Independent Trustee can distribute income or principal to John or your family	**Distributions During Lifetime:** • Income or principal can be distributed as needed for maintenance of standard of living • An Independent Trustee can distribute income or principal to Jane or your family • Jane can distribute any amounts to charity
Distributions at Death: • John can designate the beneficiaries at his death • Can select anyone other than his estate or his creditors (including charities) • If no designation made, Trust passes 50/50 to your children	**Distributions at Death:** • Jane can designate the beneficiaries at her death • Can select among only the descendants of John' parents (John, his siblings, and all of their children) and charities • If no designation made, Trust passes 50/50 to your children
Life Insurance – Not allowed	**Life Insurance –** Trust is allowed to purchase life insurance on either of your lives

CLIENT MEMORANDUM

To: Clients
From: Draeneas & Huglin, P.C.
Date: December 15, 2012
Subject: Spousal Lifetime Access Trusts/Reciprocal Trust Doctrine Spousal Lifetime Access Trust

If a married couple wishes to make use of their federal estate and gift tax exemptions, but are concerned about providing for their needs during their lifetimes, one or both of the spouses can create a Spousal Lifetime Access Trust ("SLAT") for the benefit of the other.

The term SLAT simply refers to a trust created during one spouse's lifetime ("grantor-spouse") for the benefit of the other spouse ("beneficiary-spouse"). The SLAT usually continues for the rest of the beneficiary-spouse's life. This memorandum provides an analysis of the major considerations that bear upon the creation of SLATs.

Advantages of a SLAT

The creation of a SLAT offers a number of advantages. The most obvious advantages is that the grantor-spouse can utilize the full estate tax exemption available to that spouse during his or her lifetime. The SLAT protects against the estate tax exemption being reduced in later years. The grantor may also allocate all or part of his or her generation skipping transfer tax exemption to the trust which will allow the assets to pass to grandchildren or later generations without incurring estate tax at each transfer.

The assets transferred to the SLAT will continue to appreciate inside the trust. Neither the original value of the assets nor the growth will be included in estate of either spouse at death. Thus, the trust passes to the next generation free from the federal estate tax and the 11-16% Oregon estate tax that would be due on all assets over the $1 million exemption.

During the beneficiary-spouse's lifetime, all of the assets of the trust can be made available for the benefit of the beneficiary-spouse, even though the assets are not included in his or her estate at the beneficiary-spouse's death. For example, the trust may allow the trustee to distribute as much of the income and principal of the trust as needed for the beneficiary-spouse's health, education, support and maintenance. At the same time, the trust assets are protected against the claims of creditors of either the grantor- spouse or the beneficiaries, except to the extent that the debtor is entitled to a mandatory distribution from the trust.

Clients who transfer business interests or fractional shares in real property to the trust may take valuations discounts for lack of marketability and minority ownership. The application of a valuation discount allows the grantor to transfer assets of greater value to the trust, maximizing the grantor's estate tax exemption. It is highly probable that the use of valuation discounts in this manner will be eliminated or severely curtailed in the future. A large segment of Congress believes that valuation discounts should be eliminated and, as Congress continues to look for ways to increase revenue, this would be an attractive place to cut.

Further, many SLATs are drafted as grantor trusts. In grantor trusts, the grantor retains certain powers over the trust administration (e.g., the power to substitute assets or to borrow from the

trust without security). By retaining these powers, all income of the trust will be taxed to the grantor; however, the assets of the trust are not included in the grantor's estate at his or her death. This unique dual tax status means that each time the grantor pays tax on the trust income, the grantor makes an additional gift to the trust beneficiaries in the amount of the tax the trust would otherwise have had to pay. Grantor trusts are another area that legislators have proposed changes to the tax laws that would eliminate these estate planning advantages. The proposed changes would cause the assets of grantor trusts created after the effective date of the law to be included in the grantor's estate at death.

Reciprocal Trust Doctrine

In cases where two persons create essentially identical trusts for each other, the IRS has attempted to defeat the estate tax exemption by applying the reciprocal trust doctrine.

Essentially, this doctrine holds that where each spouse creates a trust for the benefit of the other (reciprocal trusts), the court should treat each beneficiary-spouse as if he or she was the grantor of the trust created for the beneficiary-spouse. Tax-wise, the effect would be to include the assets of the trust in the beneficiary-spouse's estate under IRC §2036.

The leading cases establishing the reciprocal trust doctrine are *Lehman v. Commissioner,* 109 F2d 99 (2nd Cir. 1940), and *Estate of Grace,* 395 US 316 (1969). In *Lehman,* two brothers created identical trusts for the benefit of the other. The IRS "uncrossed" the trusts, finding that each trust was quid pro quo for the other. The decedent was treated as the grantor of the trust created by his brother and the trust was included in the decedent's estate under the predecessor statute to IRC §2036(a)(l).

In *Estate of Grace,* the Supreme Court extended *Lehman,* stating: "The application of the reciprocal trust doctrine requires only that the trusts be interrelated, and that the arrangement, to the extent of mutual value, leaves the [Grantors] in approximately the same economic position as they would have been in had they created the trusts naming themselves as life beneficiaries." Thus, after the trust is created, each grantor-spouse must be in a different economic position than he or she was before creating the trust. This may include limitations on the extent of their lifetime access to the funds or their ability to control distribution of the trust at their death.

While the IRS has imposed the reciprocal trust doctrine on several occasions to collect estate taxes, it has also recognized instances when the doctrine does not apply. If the terms of the trust that each spouse creates for the other are sufficiently different from one another, the reciprocal trust doctrine will not apply. Whether the trusts are sufficiently different from one another is a factual issue, which depends on the provisions of each trust agreement and the governing law of the state in which it is formed.

The *Estate of Levy* is the leading case where the trusts were sufficiently different to avoid the reciprocal trust doctrine. TC Memo 1983-453. In *Levy,* the trust created by the husband for the wife's benefit gave the wife a broad power of appointment over the trust for her benefit, exercisable during her lifetime or at her death in favor of anyone other than herself or her creditors, her estate or creditors of her estate. Otherwise, the trust for her benefit was the same as the trust she created for her husband. This one difference was sufficient because, by giving the wife complete control over the ultimate disposition of the trust assets, while denying the husband that ability, left the spouses in different economic positions than they were before creating the trusts.

Two IRS Letter Rulings have also addressed instances where the reciprocal trust doctrine did not apply. While Letter Rulings cannot be cited as precedent and their applicability is limited to the taxpayer who requested the ruling, these rulings do provide insight into how IRS will apply case law.

Letter Ruling 200426008 presents a scenario in which each spouse created a trust to hold insurance on his or her life, for the benefit of the other spouse and their children, including a child who was disabled. The trusts were largely similar, but the trust for the wife gave her the right to withdraw up to 5% of the trust principal each year, while the trust for the husband limited distributions to times when his net worth and income from personal services fell below certain levels. The ruling cites *Levy* and reaches a conclusion consistent with that case.

In Letter Ruling 9643013, the wife created a trust just for issue, while the husband created a trust for the benefit of the wife and her issue. Again, the IRS found the differences were sufficient to avoid application of the doctrine.

Based upon available case law and rulings, if both spouses intend to create a SLAT, the trusts must be drafted differently from each other. Ways in which the trusts may differ include:

- Distributions of income. One trust may have a mandatory income distribution while the other is discretionary.
- Distributions of principal. Provisions governing the distribution of principal may differ. For example, the beneficiary-wife, acting as trustee, may make distributions of principal to herself and her issue for their health, education, maintenance or support, and an independent trust may to distribute principal to them for any other purpose. The beneficiary-husband may be limited to distributions only for his benefit.
- Powers of appointment. One beneficiary-spouse may be given a lifetime power of appointment while the other is not. Optionally, the powers of appointment exercisable by a beneficiary in a will or other instrument at death may be broader or narrower.
- Remainder if no appointment. The list of persons who will receive the trust assets if no appointment is made by the beneficiary may differ.
- Trustee or trust protector succession. powers. The trust may differ in who may act as trustee or trust protector and in removal and appointment powers.
- Powers of grantor. In a grantor trust, the powers that the grantor is given may differ. For example, one grantor may have the right to borrow assets without security while the other does not.
- Type of assets. The type of assets gifted to the trusts may differ. For example, one grantor may gift a business interest while the other gifts real property or investments.
- Time of creation. The trusts are not created at the same time.

It does not appear necessary to incorporate all of these differences into the trusts to prevent triggering the reciprocal trust doctrine; however, a cautious approach would dictate including as many of these options as are appropriate to the client circumstances. The drafting attorney cannot guarantee how IRS policy and case law may change in the future, but can take these steps to best position the clients if an audit did occur.

Chapter 5

Farms, Forests, and Fish—The Triple F in Estate Planning

Heather Gilmore
Heather O. Gilmore PC
Keizer, Oregon

Barbara Smith
Heltzel Williams PC
Salem, Oregon

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The presenters acknowledge the contributions from the Natural Resource Exemption Workgroup, which included many CPAs and lawyers along with Clint Bentz, CPA, CMA who provided a summary of issues identified that are incorporated in these materials. Any deviations are the fault of the presenters alone.

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I. INTRODUCTION.

The Oregon Estate Tax generated $325,470,240 in state revenue in 2023. See the attached Appendixes 1-4 for the Oregon Public Finance Basic Facts Research Reports issued by the Oregon Legislative Revenue Office.

The Oregon Public Finance Basic Facts Research Reports issued by the Oregon Legislative Revenue Office reflects that the Oregon Estate Tax is consistently a large source of revenue for the state. The Estate Tax Revenue exceeds the Marijuana Tax Revenue, the Cigarette Tax Revenue, Beer & Wine Taxes, Court Fees, Fines & Assessments, and State Lodging Tax. The list is long for what sources of revenue generate less than the Estate Tax. The list is short for those sources of revenue that generate more than the Estate Tax. The sources of revenue that generate more than the Estate Tax include Personal Income Tax, Unemployment Insurance, Gasoline and Use Fuel Taxes, Corporate Income Tax, Weight Mile Tax, the Corporate Activity Tax, Medical Provider/Hospital Taxes, and several of the local taxes such as Real Property Taxes. The Oregon Estate Tax revenue has more than tripled since 2009.

SB 498 was filed pre-session for the 2023 Regular Legislative Session. The chief sponsors of the bill were: Senator Hansell, Findley, Smith DB, and Representatives Levy B, and Mannix. The bill was passed by the Senate on June 20, 2023. The Bill was passed by the House on June 23, 2023. As is typical, the bill filed pre-session was different from the Bill that was passed. Some of the difficult to administer/interpret provisions were contained in the amendments.

The original Fiscal Impact Statement dated 5/31/2023 shows minimal expenditure impact. The Statement includes a Measure description which states:

A. *The Measure Description:*

Creates an exclusion from the Estate Tax for any interest in natural resource property that is held by a decedent for at least five years prior to death and is transferred, at the time of death to one or more family members of the decedent. Requires material participation of a family member 75% of each year five years prior to decedent's death and five years after. Reimposes tax eliminated by the exclusion if the property is sold or transferred to a person other than a family member in the five calendar years after the decedent's death or if material participation requirement is not met. Allows estates to claim an exclusion of up to $15 million of natural resource property value and prohibits claiming the existing Natural Resource Credit if they claim such exclusion. Applies to the estates of decedents dying on or after July 1, 2023.

Revenue Impact (in $Millions):

Revenue Impact (in $Millions):

Fiscal Year Biennium

2023-24 2024-25 2023-25 2025-27 2027-29

General Fund - Estate Tax - $0.6 - $7.4 - $8.0 - $15.5 - $16.4

B. *Impact Explanation:*

The measure creates an option for estates with natural resource property to claim either the existing Natural Resource Credit, or the new exclusion. The exclusion is more favorable due to reduced requirements for ownership and business-use of qualifying property, an increased maximum value of qualifying property, and an elimination of the maximum total value of property in estates that qualify. The revenue impact includes the reduction in tax that is expected for estates that use the exclusion and would have claimed the credit, as well as estates that use the exclusion but would not have claimed the credit.

Currently about 50 to 60 estates use the credit each year. The average tax reduction to those that qualify for the credit will increase with the exclusion both because the exclusion provides a greater benefit for a given value of property, and because the ownership and business-use requirements for claimed property will increase the value of property those estates claim. Based on estate tax returns, it is estimated the total reduction in tax for estates in 2024 that would otherwise claim the credit would be $1.6 million with the exclusion in addition to the reduction they would get if only the credit were available.

Based on property value statistics as well as income and wealth statistics for farm, forest, and fishing property owners, it is estimated that each year about 170 Oregon estates that owe estate tax have some natural resource property but are not currently using the credit because of current value limitations or ownership and business- use requirements. Such estates are estimated to have reduced tax under the new exclusion of about $5.9 million for 2024. The revenue estimate for estates that don't currently use the credit are adjusted based on statistics for length of ownership for family farms and the amount of farmland owned by non-farmer landlords. The due date for estate tax payments is 12 months after death of the decedent. Growth in the revenue impact each year is based on growth in the number of estates, and in the value of natural resource property. The growth estimates primarily rely on forecasts developed the Office of Economic Analysis including deaths in the Oregon population forecast as well as the estate tax collections forecast.

II. The Final Statute:

The final statute is ORS 118.145. The statute is below.

> 118.145 Natural resource property exempted. (1) As used in this section:
>
> (a) "Family member" means a person within the third degree of relation, by blood, marriage, adoption, civil union or domestic partnership, to another person.
>
> (b) "Materially participate" means to engage in the active management, as defined in section 2032A of the Internal Revenue Code, of a farm business, forestry business or fishing business owned by the decedent on the date of the decedent's death. The Department of Revenue may adopt rules to administer this section consistent with this definition.
>
> (c) "Natural resource property" has the meaning given that term in ORS 118.140.
>
> (2) An interest in natural resource property is exempt from the tax imposed under this chapter if:

(a) The property is held by a decedent for at least five years before the death of the decedent;

(b) During at least 75 percent of the days of each of the five calendar years immediately prior to date of the decedent's death, the decedent or any family member of the decedent materially participates in the farm business, forestry business or fishing business;

(c) The interest is transferred, as a consequence of the decedent's death, to one or more family members of the decedent and is subsequently owned by family members of the decedent for at least five consecutive calendar years beginning with the calendar year immediately following the date of the decedent's death; and

(d) During at least 75 percent of the days of each of the five calendar years immediately following the date of the decedent's death, any family member of the decedent materially participates in the farm business, forestry business or fishing business.

(3) An additional tax under ORS 118.005 to 118.540 shall be imposed if:

(a) The natural resource property for which an exemption is allowed under this section is, during the five calendar years following the date of the decedent's death, subsequently sold or otherwise transferred to a person other than a family member of the decedent; or

(b) The material participation requirement of subsection (2)(d) of this section is not met.

(4) The additional liability imposed under subsection (3) of this section shall be the amount of additional tax that would have been imposed had the transferred property been included in the decedent's taxable estate. Upon receiving notice of a subsequent sale or other transfer of property for which an exemption has been claimed, or upon receiving notice that the material participation requirement of subsection (2)(d) of this section has not been met, the department shall immediately proceed to collect the additional tax.

(5) An estate claiming the exemption under this section may not claim the credit allowed under ORS 118.140.

(6) The exemption allowed under this section may not exceed $15 million for the estate. [2023 c.286 §2]

Note: 118.145 was added to and made a part of ORS chapter 118 by legislative action but was not added to any smaller series therein. See Preface to Oregon Revised Statutes for further explanation.

A. The Oregon Administrative Rule:

The Oregon Department of Revenue formed a Rules Advisory Committee for the new legislation. The Rules Advisory Committee identified several significant issues where guidance from the

Oregon Department of Revenue would be helpful. Those issues are discussed in more detail later in these materials.

A proposed Administrative Rule was anticipated for the Oregon Bulletin for June of 2024. The Notice of Proposed Rule Making for the new ORS 118.145 did not make it into the June 2024 Oregon Bulletin.

III. UNDERSTANDING THE EXEMPTION STATUTE.

A. Definition of Family Member. (a) "Family member" means a person within the third degree of relation, by blood, marriage, adoption, civil union or domestic partnership, to another person. This is a broader definition than the definition of family member under IRC 2032A and a broader definition than the Oregon Natural Resource Credit under ORS 118.140. It provides relief to those families who may farm with their in-laws. It also respects the broader definition of marriage/partnership/civil union under Oregon law.

B. Definition of Materially Participate. This remains as defined under IRC 2032A, but the additional provisions in ORS 118.145(2)(c) complicate this in an unanticipated fashion that requires thoughtful consideration for planning to use the exclusion and advice to clients on documentation of what the client is doing during the off season.

C. Definition of Natural Resource Property. The definition of natural resource property is the same as the definition of natural resource property for the Oregon Natural Resource Credit. It includes the following:

ORS 118.140(1)(i) provides:

> (i) "Natural resource property" means the following property in this state, if on the date of the decedent's death the property is owned by the decedent and used in the operation of a farm business, forestry business or fishing business owned by the decedent:
>
> (A) Real property used as forestland or as forestland homesites, not to exceed 5,000 acres, or that is in farm use.
>
> (B) Timber or trees.
>
> (C) Crops, fruit or other horticultural products, both growing and stored.
>
> (D) Forestry business or farm business equipment.
>
> (E) Livestock, poultry, fur-bearing animals, bees, dairying animals, equines, aquatic species, birds or other animal species, including stored products or by-products.
>
> (F) Nursery stock as defined in ORS 571.005.

(G) Boats, gear, equipment, vessel licenses or permits, commercial fishing licenses or permits and other real or personal property used in the operation of a fishing business.

(H) Real or personal property used to process and sell the catch of a fishing business in fresh, canned or smoked form directly to consumers, including a restaurant with seating capacity of fewer than 15 seats at which catch from the fishing business is prepared and sold.

(I) An operating allowance.

(J) Any other tangible and intangible personal property used in the operation of a farm business, forestry business or fishing business.

(j) "Operating allowance" means cash or a cash equivalent that is spent, maintained, used or available for the operation of a farm business, forestry business or fishing business and not spent or used for any other purpose.

There are significant questions about whether ORS 118.140(1)(i)(J) works for family business interests held in LLC's or other operating entities. It is anticipated that the administrative rule will address this and clarify that natural resource property within an entity qualifies for the exclusion in the same manner natural resource property within an entity qualifies for the credit. The sponsors of the legislation indicate that this was their intent.

D. Outright Exclusion from Tax. Under ORS 118.145(2) the natural resource property that otherwise meets the requirements of the law is entirely exempt, excluded from the value of the gross estate. It is not even a deduction. It is simply exempt from inclusion in the gross estate. It must be reported on the return, but the value is exempt. This is likely to result in challenges with other calculations related to the estate tax such as the percentage of in-state versus out of state property. It is anticipated that the forms and the Administrative Rule will address this.

E. Predeath Holding Period. ORS 118.140(2)(a) imposes a 5-year holding period by the decedent. The decedent or any family member of the decedent must materially participate during this 5-year predeath holding period.

F. Transfer as a Consequence of the Decedent's Death. The interest for which an exclusion is taken must be transferred, as a consequence of the decedent's death, to one or more family members of the decedent. This appears to indicate it can be a transfer for value to a family member, but it is unclear.

G. Post Death Holding Period. There is a 5-year post death holding period following the decedent's date of death. The interest must be subsequently owned by family members of the decedent for at least five consecutive calendar years beginning with the calendar year immediately following the date of the decedent's death. The administrative rule may include provisions to support the material participation during the period of administration. A member of the decedent's family must materially participate during the 5-year post death holding period.

H. Material Participation for at Least 75% of Days. During at least 75 percent of the days of each of the five calendar years immediately following the date of the decedent's death, any family member of the decedent must materially participate in the farm business, forestry business or fishing business. There are many questions about the 75% of days requirement. This is particularly true for ranching, forestry and fishing where the seasons are shorter. However, those operating such businesses often do major off-season work. See below for how to help your client plan to use this and document the material participation.

I. Recapture of the Tax. Under ORS 118.145(3) an additional tax is imposed if:

a. The natural resource property for which an exemption is allowed under this section is, during the five calendar years following the date of the decedent's death, subsequently sold or otherwise transferred to a person other than a family member of the decedent; or

b. The material participation requirement is not met.

J. Amount of Recapture Liability. The additional liability imposed is the amount of additional tax that would have been imposed had the transferred property been included in the decedent's taxable estate. There is no pro-ration based on number of months/years. It is a strict holding period.

K. When is the Recapture Tax Due. The statute provides that upon receiving notice of a subsequent sale or other transfer of property for which an exemption has been claimed, or upon receiving notice that the material participation requirement is not met, the department shall immediately proceed to collect the additional tax. The statute is silent on who is liable for the tax. The statute is silent on reporting. It is anticipated that the administrative rule and forms will make this similar to the Oregon Resource Credit. The liability description does not appear to include interest or penalties. However, it would be helpful if the administrative rule addresses this.

L. No Use of Both the Credit and Exemption. As per 118.145 (5) an estate claiming the exemption may not claim the credit allowed under ORS 118.140.

M. Maximum Amount of Exemption. The maximum amount that can be exempted from tax is $15 Million as per ORS 118.145(6). The size of the estate is irrelevant. The size of the exemption is limited.

IV. THE COMPARISON BETWEEN THE NATURAL RESOURCE EXEMPTION AND THE NATURAL RESOURCE CREDIT.

Requirements and Definitions:	**Natural Resource Credit (NRC) – 118.140 – 2.5 pages**	**Natural Resource Exemption (NRE) – 118.145 – less than 1 page**
Extent of Tax Relief	Tax Credit on up to $7.5 million of eligible property. (2)(b). Result is that the eligible property uses the $1 million exemption and thus assets not qualifying will be taxed in the higher brackets.	Reduction of taxable estate by up to $15 million of eligible property. (6). Result is that if the decedent's noneligible property is less than $1 million, then there is no estate tax.
Limitation on Gross Estate to claim benefit	$15 million (3)(a)	None
Percentage of Estate Requirement to claim benefit	Eligible property value must be at least 50% of the "adjusted gross estate" located in Oregon. (3)(b)	None
Family Member definition	Defined by IRC Section 2032A. (1)(b).	Person within third degree of relation by blood, marriage, adoption, civil union or domestic partnership. (1)(a).
Ownership Before Death	Owned by the decedent immediately prior to death. (1)(i). For real property, owned by decedent or a family member during an aggregate period of 5 out of 8 years ending on the date of the decedent's death. (5).	The property is held by decedent for at least 5 years before death. (2)(a)
Use Before Death	Decedent or family member operated the eligible property for a minimum of 5 out of 8 years ending on decedent's date of death. (3)(d)	The decedent or family member materially participates in the farm business, forestry business or fishing business for at least 75% of days of each of the five calendar years immediately prior to date of the decedent's death. (2)(b).
Ownership After Death	Has to have been transferred to a family member. (3)(c). The holding of property in trust for a qualified beneficiary who is a family member meets this requirement. (4)(b). If transferred	The interest is owned by one or more family members for at least 5 consecutive calendar years beginning with the calendar year immediately following the date of the decedent's death. (2)(c).
Use After Death	The eligible property must be used in the farm business, forestry business or fishing business for at least 5 out of 8 **calendar** years following the decedent's death. (9)(a).	During at least 75% of days of each of the five calendar years immediately following the date of the decedent's death, any family member materially participates in the farm business, forestry business or fishing business. (2)(d).

Materially Participates is defined as active management. Active Management requirement by Decedent or Family Member. See IRC section 2032A for definition of Active Management.	If owned indirectly by the decedent or a family member through an LLC, corporation, partnership or trust as the terms corporation, partnership or trust are used in IRC section 2032A(g), then at least one family member must have active management of the farm business, forestry business or fishing business. (8) If owned directly, no requirement.	75% of days of each of the five calendar years immediately prior to date of the decedent's death. (2)(b). 75% of days of each of the five calendar years immediately following the date of the decedent's death. (2)(d).
Effect of IRC 1031, exchanges pursuant to IRC 1033 involuntary conversion, or selling and purchasing replacement property.	Allows tacking for holding period prior to death. (7) See also (4)(c) and (9)(d) regarding replacing property.	Not mentioned.
When additional tax is owed.	It is due within 6 months after the date on which the disposition or event occurs. (9)(e).	If there is a transfer or there ceases to be material participation additional tax is owed. (3)(a) and (b). The DOR is to collect it "immediately" after they are notified. (4).
Amount of additional tax	Uses fraction based on amount of time elapsed in qualifying ownership and use divided by 5 years to determine the percentage of the additional tax that is due. (9)(e).	No specification that it would be less than all of the additional tax as if the property did not qualify for the exemption from the date of decedent's death. (4).
Responsibility for additional tax on disposition or change of use	The owner of the property at the time of the disposition or disqualifying event. (9)(e)(f).	The Department of Revenue shall immediately proceed to collect the additional tax. (4). Omits any mention of who owes the tax.
Exclusivity as between NRC and NRE	If the NRC is claimed, then the NRE may not be claimed.	If the NRE is claimed, then the Natural Resource Credit in ORS 118.140 may not be claimed. (5).
Natural Resource Property (NRP)	Qualifying Property owned by the decedent and used in a farm, forestry, or fishing business. (1)(i)(A - J)	Definition of "Natural Resource Property" as defined in ORS 118.140. (1)(c).
Additional Real Property limitation	Real property used as forestland must be less than 5,000 acres	No additional requirements.

This chart is based on the ORS 118.145 as originally enacted and before any other guidance, rules or forms were promulgated by the Oregon Department of Revenue.

V. PLANNING TO USE THE NATURAL RESOURCE EXEMPTION.

Until the Administrative Rule is issued, it is difficult to know what is expected for clients. These are some general ideas being discussed to help clients in this time period when it is unclear.

A. Identifying Some of the Unknowns About the Statute. It is helpful to understand what the statute does not address to help clients create a plan to use the exemption. Below is a list of items where there are questions.

a. Family members: Using the third degree of relation to define family members is different from the IRC 2032A definition of family member like was done for the NRC. It provides an expanded definition which may be beneficial.

b. The statute says Natural Resources Property has the meaning given that term in ORS 118.140. It is not clear whether this extends to the requirement in ORS 118.140(5) that the real property be held for five of eight years prior to death or just five years. It appears to be just 5 years subsequent to the decedent's death. It is not clear whether ORS 118.140(7) applies, which allows for 1031 exchanges or 1033 involuntary conversions. The administrative rule is expected to address this.

c. "An interest in" natural resource property is exempt… "An interest in" is not defined in the statute. It appears to include indirect ownership of property held in a partnership, corporation, LLC, trust or estate, but it is uncertain until an OAR is issued addressing this. In order to issue an OAR, the OAR must have statutory authority. The plain language of the statute goes on to say "the property is held by" which under one interpretation indicates that only those holding direct ownership of the NRP are eligible for the exemption. ORS 118.140(8) which specifically allows for indirect ownership of NRC property is a post death holding requirement under the credit. ORS 118.140(8) – a post death credit requirement is not integrated into ORS 118.145 regarding the exemption. It is hoped that the administrative rule will clarify this to ensure that the definition of intangible personal property as natural resource property allows indirect ownership.

d. The material participation standard uses the IRC 2032A definition for active management (same as the NRC). The new exemption goes further by requiring family members to have evidence of material participation for 75% of the days in the five full calendar years immediately prior to and following the date of death, (but not counting the year of death itself). This creates an 11-year window where the only year material participation is not required is the year of death.

e. 75% of days is 274 days of active management in each year (365 days x 75%). There is a concern that only year-round, full-time operations will qualify for the exemption. This was not the intention of the drafters of SB 498. The definition of material participation under IRC 2032A helps resolve some of this uncertainty. The making of decisions, the ability to make/consider/gather information to make decisions all apply. Most real farm, forest and fish family members consider these things almost every day.

- Timber owners can exercise active management under IRC 2032A by making management decisions and overseeing the work done by their contractors. In most years, there may only be a handful of days of actual work required to manage and operate a

typical family forestland property. However, the administrative rule may address this as the responsibility for those decisions. At least, that is the hope.

- Landowners with crop-share leases exercise active management under IRC 2032A by working with the tenant farmer to decide which crops to grow and providing their share of the inputs under the crop-share agreement. This often may not add up to 274 days. However, again, it is the responsibility that exists on those 274 days which may count.
- Smaller farming operations may not operate for 274 days during the year – adding up the time between harvest and planting in the winter and days when the crops are simply growing without the need for daily management can easily exceed 91 days. The same issue arises again with the ability/responsibility for those decisions.
- Many fishermen are not on the water 274 days during the year, some fishing seasons only last for a couple of days. The security of the boat, gear, sale of harvest, working with bankers, shopping for equipment. All of these factors may assist fishermen.

f. It is not clear whether multiple family members add up their days to get to 274 or whether active management has to occur on 274 separate days during the year with just one person?

g. There is no guidance on what type of documentation will be needed to satisfy the material participation requirement. Clients should try and regularly document what they do in a month if the client or client's family intends to use this credit. The burden is easier with traditional western Oregon farms than the burden for others who this credit is intended to benefit. Have clients keep financials, emails, files in buying equipment, working with financing, harvest, tracking prices, fire safety of the crop, security of the land with interlopers.

h. The NRC does not have an active management requirement pre-death, only a use requirement. The NRC only requires active management by a family member post death when the property is held indirectly. The NRC allows the credit no matter how few or many days that may require. There is no active management requirement if the property is held directly post-death, but there is a use requirement. If a family is not able to keep records or is not the actual farmers, fishermen or the forestry family, the credit may be a more reasonable alternative.

i. The taxpayer is required to provide notice to the department on sale or failure to meet the material participation requirements. A form is required.

j. If there is recapture, it is assumed the estate is required to use the date of death assets and values for this computation regardless of post-death changes in value. Hopefully, this is an accurate assumption as nothing in the statute indicates otherwise.

k. No provision is made for reinvestment of the proceeds in other natural resource property as in the NRC. This is counter-productive to the purpose of keeping the entity operating in family ownership. If nothing can be sold and reinvested during the 5-year run-out period, it hampers the operation. For example, if timber is harvested or a crop is sold, the operation should be able to use part of the proceeds to do the reforestation or pay its debt without triggering the tax. Some farmers use debt to finance their operations, others use cash. The Operating Allowance was put in place so that NR businesses could have the cash reserves that had been set aside inside the business at death count as NRP. When the operating allowance was used to pay bills for the business or to acquire new NRP it was not considered as a disposition. After death, the proceeds from the sale of assets that were elected for the NRC could be put into an operating allowance and held until used pay bills or to purchase new NRP without

it being considered a disposition. There was a 12-month reinvestment requirement in new real property if elected real property was sold (24 months for involuntary conversions – condemnation reinvestment).

l. There is no guidance on how to treat a partial sale – for example harvesting some of the timber, selling a piece of equipment, distributing some of the operating allowance. What gets included for the additional tax computation and what value is used? For the NRC, a proportional method was used where the percentage of the proceeds that was not reinvested and that percentage was applied to the original amount included in the NRC computation.

m. If not all the assets are sold, does the additional tax only apply to the specific assets sold or is the avoided tax at death recaptured dollar for dollar as happens in IRC 2032A? The statute seems to indicate that only the assets sold are taken out of the original computation and the estate tax would then be recomputed to come up with the additional tax due.

n. Does the harvest of the timber growth after the date of death get treated as a disposition? It is not for purposes of the NRC because the additional timber did not exist at the date of death.

o. Can the executor make partial elections on property – for example only including 60% of the volume and value of the timber or farmland– or are they required to elect on the entire property? It appears a partial election may occur, but it is ambiguous.

p. If a partial non-elected portion is sold, is that treated as a pro-rata disposition of the entire asset or treated as having sold the non-elected portion first?

B. Planning to Use the Exemption.

a. Documentation of Material Participation. Each client's circumstances will be different. Consider the following options to help document material participation.

- Who keeps the financial records and how are they kept. Have the client enter data in the finances at least once a week. If there are no bills, use the budget feature in some software like QuickBooks to make sure business is operating in the budget. QB has a tracker on who opens and enters data.
- Who gets the mail and how often is it picked up if it is a PO Box.
- Who holds the permits for fish, compliance with boats, pays the rent for the slip, if there is a storm who makes sure the boat is secure.
- Who deals with chemical application license, gas other potential environmental issues and how is it documented.
- Who sells the harvest or the crops and deals with any middlemen on the sale
- Someone watches prices, who does that? Consider documenting weekly prices in a phone calendar or other calendar.
- Save emails for work.
- Who checks the property for squatters and how often.
- Who pays employees, signs payroll reports
- Who organizes equipment repair and maintenance.
- Who arranges financing or deals with the line of credit and how is that documented.
- Who reads trade journals or magazines.

- Who attends any association meetings or reads their newsletters.

b. Income Tax Return Reporting to Support Material Participation. Talk to the client about how the tax return may or may not support material participation. This is what ODR has access to. If they have cash rented the land for a long time with no other evidence they are out actually working, it could be a problem. Do crop share leases and have the decedent or a family member document their meetings with the tenant.

c. IRC 2032A. The Triple F/NRE legislation was intended to benefit the actual operators of NR property. This is the basis for the 75% of days requirement. The NRC does not have the same strict standards. A crop share lease may be insufficient to justify the 75% of days requirement.

C. Pending Oregon Administrative Rule. Initially, the Oregon Department of Revenue intended to publish a proposed new administrative rule in the June 2024 Oregon Bulletin. This was not possible. It is hoped that the new proposed administrative rule and forms will be issued in July 2024. Oregon Department of Revenue is attempting to write a proper rule that has proper authority under the statute while at the same time dealing with some of the practical problems the legislation did not contemplate.

D. Legislative Action. It would be helpful to have some corrective legislation for both practitioners and ODR. There is concern that a proper correction could be too political for the legislature. This is an approach that ignores the reality that this is the current law and the ambiguity needs to be resolved.

Source: 2021 Oregon Public Finance Basic Facts Research Report #1-21 Legislative Revenue Office. (01/27/2021) In Oregonlegislature.gov Retrieved 21 May 2024, https://www.oregonlegislature.gov/lro/Documents/Basic%20Facts%202021.pdf, Page A7.

TABLE 7

SUMMARY OF OREGON TAXES

STATE	*2009-2010 COLLECTIONS*	*2018-2019 COLLECTIONS*	*2019-2020 COLLECTIONS***	*y/y % change*	*% change since 2010*
PERSONAL INCOME TAX	$4,945,537,939	$9,933,897,483	$8,484,238,146	-14.6%	71.6%
UNEMPLOYMENT INSURANCE TAXES	$711,175,485	$897,693,747	$786,914,671	-12.3%	10.6%
GASOLINE AND USE FUEL TAXES	$405,825,256	$623,364,110	$598,247,065	-4.0%	47.4%
CORPORATE INCOME TAX	$353,589,263	$926,706,639	$835,268,723	-9.9%	136.2%
WEIGHT MILE TAX	$209,752,519	$382,794,961	$397,475,547	3.8%	89.5%
CIGARETTE TAX	$201,863,281	$194,401,297	$187,697,452	-3.4%	-7.0%
INSURANCE TAXES	$43,235,265	$28,547,773	$31,909,556	11.8%	-26.2%
OTHER LABOR TAXES	$68,437,516	$82,646,560	$74,267,480	-10.1%	8.5%
TIMBER SEVERANCE TAXES	$215,134	$1,284,621	$523,599	-59.2%	143.4%
ESTATE (INHERITANCE) TAX	$98,034,497	$204,733,827	$267,329,175	30.6%	172.7%
WORKERS' COMP INSURANCE TAXES	$31,057,070	$69,297,191	$71,151,323	2.7%	129.1%
PHONE EXCHANGE (911) ACCESS TAX	$39,644,987	$44,585,905	$49,170,857	10.3%	24.0%
OTHER TOBACCO PRODUCTS TAX	$37,390,367	$58,333,110	$57,978,269	-0.6%	55.1%
REAL ESTATE RECORDING	$28,319,320	$52,553,798	$68,965,626	31.2%	143.5%
SENIOR DEFERRED PROPERTY TAX	$16,772,420	$19,277,598	$16,448,575	-14.7%	-1.9%
BEER & WINE TAXES	$16,584,500	$19,260,146	$18,089,598	-6.1%	9.1%
FOREST PRODUCTS HARVEST TAXES	$10,960,968	$16,371,271	$15,436,288	-5.7%	40.8%
ELECTRIC COOP TAX	$7,821,783	$8,508,729	$7,274,255	-14.5%	-7.0%
PHONE ACCESS SURCHARGE (RSPF)	$5,513,727	$4,479,434	$5,930,134	32.4%	7.6%
AMUSEMENT DEVICE TAX	$1,834,931	$2,807,957	$1,249,558	-55.5%	-31.9%
HAZARDOUS SUBSTANCE TAXES	$2,619,770	$2,885,960	$3,038,532	5.3%	16.0%
AVIATION GAS AND JET FUEL TAXES	$1,876,912	$6,698,368	$5,827,406	-13.0%	210.5%
PETROLEUM LOADING FEE	$1,187,817	$2,377,716	$2,606,268	9.6%	119.4%
BOXING TAX	$187,351	$69,999	$76,706	9.6%	-59.1%
PRIVATE RAIL CAR TAX	$319,702	$285,523	$318,931	11.7%	-0.2%
OIL & GAS SEVERANCE TAX	$295,410	$7,103	$3,261	0.0%	-98.9%
STATE LODGING TAX	$10,445,735	$40,656,843	$40,575,225	-0.2%	288.4%
COURT FEES, FINES & ASSESSMENTS	NA	$60,188,694	$55,199,290	-8.3%	NA
CORPORATE ACTIVITY TAX	NA	NA	$226,517,641	NA	NA
MEDICAL PROVIDER/HOSPITAL TAXES	$251,445,920	$845,578,536	$832,247,094	-1.6%	231.0%
MARIJUANA TAX	NA	$117,797,932	$153,917,695	30.7%	NA
HEAVY EQUIPMENT RENTAL TAX	NA	$910,266	$5,022,056	451.7%	NA
STATEWIDE TRANIST PAYROLL TAX	NA	$75,425,793	$109,064,377	44.6%	NA
BICYCLE EXCISE TAX	NA	$718,836	$720,261	0.2%	NA
VEHICLE DEALER PRIVILEGE TAX	NA	$27,995,201	$27,686,225	-1.1%	NA
VEHICLE USE TAX	NA	$8,699,683	$6,231,134	-28.4%	NA
LOCAL TAXES	***2009-2010 COLLECTIONS***	***2018-2019 COLLECTIONS***	***2019-2020 COLLECTIONS*****	***y/y % change***	***% change since 2010***
PROPERTY TAXES*	$4,939,266,903	$7,127,069,689	$7,491,493,133	5.1%	51.7%
TRANSIT PAYROLL & EMPLOYMENT TAXES	$230,679,947	$413,657,825	$434,469,233	5.0%	88.3%
FRANCHISE TAXES***	$183,180,260	$316,715,559	$315,887,250	-0.3%	72.4%
HOTEL-MOTEL	$92,368,129	$217,319,170	$216,882,910	-0.2%	134.8%
PORTLAND BUSINESS LICENSE TAX**	$56,531,784	$148,543,294	$172,007,558	15.8%	204.3%
MULTNOMAH COUNTY BUSINESS TAX	$44,150,000	$99,500,000	$104,300,000	4.8%	136.2%
MOTOR VEHICLE RENTAL TAX	$20,105,000	$42,191,997	$28,206,000	-33.1%	40.3%
MOTOR FUEL TAXES	$16,113,147	$36,684,864	$33,876,663	-7.7%	110.2%
WASHINGTON COUNTY TRANSFER TAX	$2,499,002	$6,683,474	$6,676,069	-0.1%	167.1%
OTHER TAXES ***	$420,021,970	$898,161,372	$952,802,550	6.1%	126.8%

* includes tax imposed and urban renewal revenue

** For tax year 2018 and beyond the City of Portland raised its tax rate from $2.2% to 2.6%.

*** Estimates where actuals are not available

LRO 1/27/2021 A7 Research Report #1-21

Source: 2022 Oregon Public Finance Basic Facts Research Report #1-22 Legislative Revenue Office. (01/31/2022) In Oregonlegislature.gov Retrieved 21 May 2024, https://www.oregonlegislature.gov/lro/Documents/Basic%20Facts%202022.pdf, Page A7.

TABLE 7

SUMMARY OF OREGON TAXES

STATE	FY 2011	FY 2020	FY 2021 **	y/y % change	% change since 2011
PERSONAL INCOME TAX	$5,493,120,002	$8,484,238,146	$11,508,089,735	35.6%	109.5%
UNEMPLOYMENT INSURANCE TAXES	$912,158,000	$789,369,783	$884,555,824	12.1%	-3.0%
GASOLINE AND USE FUEL TAXES	$454,462,044	$598,247,065	$622,834,788	4.1%	37.0%
CORPORATE INCOME TAX	$468,606,463	$835,268,723	$1,201,252,291	43.8%	156.3%
WEIGHT MILE TAX	$245,852,518	$396,026,454	$432,241,307	9.1%	75.8%
CIGARETTE TAX	$211,645,072	$187,697,452	$296,810,404	58.1%	40.2%
INSURANCE TAXES	$43,235,265	$31,909,556	$34,899,228	9.4%	-19.3%
OTHER LABOR TAXES	$70,486,050	$74,267,480	$64,378,131	-13.3%	-8.7%
TIMBER SEVERANCE TAXES	$252,687	$523,599	$516,021	-1.4%	104.2%
ESTATE (INHERITANCE) TAX	$76,248,946	$267,329,175	$256,737,131	-4.0%	236.7%
WORKERS' COMP INSURANCE TAXES	$34,295,510	$71,151,323	$71,975,351	1.2%	109.9%
PHONE EXCHANGE (911) ACCESS TAX	$39,539,082	$49,170,857	$65,129,612	32.5%	64.7%
OTHER TOBACCO PRODUCTS TAX	$51,154,246	$57,978,269	$67,451,248	16.3%	31.9%
REAL ESTATE RECORDING	$33,641,626	$68,965,626	$80,680,875	17.0%	139.8%
SENIOR DEFERRED PROPERTY TAX	$13,764,463	$16,448,575	$19,551,785	18.9%	42.0%
BEER & WINE TAXES	$16,181,608	$18,089,598	$17,411,049	-3.8%	7.6%
FOREST PRODUCTS HARVEST TAXES	$11,326,155	$15,436,288	$14,536,165	-5.8%	28.3%
ELECTRIC COOP TAX	$5,344,822	$7,274,255	$10,174,994	39.9%	90.4%
PHONE ACCESS SURCHARGE (RSPF)	$6,395,453	$5,930,134	$5,930,134	0.0%	-7.3%
AMUSEMENT DEVICE TAX	$2,961,399	$1,249,558	$2,106,564	68.6%	-28.9%
HAZARDOUS SUBSTANCE TAXES	$2,577,741	$3,038,532	$3,325,260	9.4%	29.0%
AVIATION GAS AND JET FUEL TAXES	$1,828,086	$5,827,406	$4,303,589	-26.1%	135.4%
PETROLEUM LOADING FEE	$1,076,376	$2,606,268	$2,738,925	5.1%	154.5%
BOXING TAX	$56,574	$76,706	$0	-100.0%	-100.0%
PRIVATE RAIL CAR TAX	$266,907	$318,931	$240,149	-24.7%	-10.0%
OIL & GAS SEVERANCE TAX	$243,554	$3,261	$1,225	-62.4%	-99.5%
STATE LODGING TAX	$11,144,975	$40,575,225	$23,824,563	-41.3%	113.8%
COURT FEES, FINES & ASSESSMENTS	NA	$55,199,290	$45,433,443	-17.7%	NA
CORPORATE ACTIVITY TAX	NA	$226,517,641	$1,148,386,670	407.0%	NA
MEDICAL PROVIDER/HOSPITAL TAXES	$275,973,871	$897,148,115	$1,024,702,185	14.2%	271.3%
MARIJUANA TAX	NA	$153,917,695	$206,263,921	34.0%	NA
HEAVY EQUIPMENT RENTAL TAX	NA	$5,022,056	$7,347,348	46.3%	NA
STATEWIDE TRANIST PAYROLL TAX	NA	$109,064,377	$110,678,300	1.5%	NA
BICYCLE EXCISE TAX	NA	$720,261	$1,025,648	42.4%	NA
VEHICLE DEALER PRIVILEGE TAX	NA	$27,686,225	$29,680,240	7.2%	NA
VEHICLE USE TAX	NA	$6,231,134	$7,932,371	27.3%	NA
OTHER DOR COLLECTIONS	NA	$76,391,399	$57,069,830	-25.3%	NA
LOCAL TAXES	**2010-2011**	**2019-2020**	**2020-2021**	**% change**	**since 2011**
PROPERTY TAXES*	$5,021,861,380	$7,491,493,133	$7,855,999,385	4.9%	56.4%
TRANSIT PAYROLL & EMPLOYMENT TAXES	$244,204,524	$434,469,233	$454,721,130	4.7%	86.2%
FRANCHISE TAXES***	$192,888,814	$315,887,250	$314,876,411	-0.3%	63.2%
HOTEL-MOTEL	$95,416,277	$217,319,170	$163,823,199	-24.6%	71.7%
PORTLAND BUSINESS LICENSE TAX**	$63,121,484	$172,007,558	$178,536,199	3.8%	182.8%
MULTNOMAH COUNTY BUSINESS TAX	$48,570,000	$104,300,000	$136,242,000	30.6%	180.5%
MOTOR VEHICLE RENTAL TAX	$20,842,000	$28,206,000	$20,324,000	-27.9%	-2.5%
MOTOR FUEL TAXES	$16,228,195	$33,876,663	$32,610,022	-3.7%	100.9%
WASHINGTON COUNTY TRANSFER TAX	$2,301,442	$6,676,069	$7,987,787	19.6%	247.1%
OTHER TAXES ***	$450,566,086	$952,802,550	$964,045,620	1.2%	114.0%

* includes tax imposed and urban renewal revenue

** For tax year 2018 and beyond the City of Portland raised its tax rate from $2.2% to 2.6%.

*** Estimates where actuals are not available

Source: 2023 Oregon Public Finance Basic Facts Research Report #1-22 Legislative Revenue Office. (02/20/2023) In Oregonlegislature.gov Retrieved 21 May 2024, https://www.oregonlegislature.gov/lro/Documents/Basic%20Facts%202022.pdf, Page A7.

TABLE 7

SUMMARY OF OREGON TAXES

STATE	FY 2012	FY 2021	FY 2022	y/y % change	% change since 2011
PERSONAL INCOME TAX	$5,825,202,930	$11,508,089,735	$12,354,562,424	7.4%	112.1%
UNEMPLOYMENT INSURANCE TAXES	$1,016,282,011	$887,988,499	$1,163,698,324	31.0%	14.5%
GASOLINE AND USE FUEL TAXES	$489,630,430	$622,834,788	$654,945,569	5.2%	33.8%
CORPORATE INCOME TAX	$430,988,674	$1,201,252,291	$1,621,859,675	35.0%	276.3%
WEIGHT MILE TAX	$264,290,637	$433,333,367	$460,881,760	6.4%	74.4%
CIGARETTE TAX	$203,486,635	$296,810,404	$372,893,164	25.6%	83.3%
INSURANCE TAXES	$56,638,286	$34,899,228	$36,676,167	5.1%	-35.2%
OTHER LABOR TAXES	$71,357,926	$64,378,131	$68,653,030	6.6%	-3.8%
TIMBER SEVERANCE TAXES	$380,116	$516,021	$470,275	-8.9%	23.7%
ESTATE (INHERITANCE) TAX	$101,766,033	$256,737,131	$325,074,569	26.6%	219.4%
WORKERS' COMP INSURANCE TAXES	$49,638,233	$71,975,351	$87,345,441	21.4%	76.0%
PHONE EXCHANGE (911) ACCESS TAX	$39,270,765	$65,129,612	$78,159,964	20.0%	99.0%
OTHER TOBACCO PRODUCTS TAX	$52,167,233	$67,451,248	$94,003,240	39.4%	80.2%
REAL ESTATE RECORDING	$23,042,048	$80,680,875	$72,522,270	-10.1%	214.7%
SENIOR DEFERRED PROPERTY TAX		$19,551,785	$11,952,772	-38.9%	NA
BEER & WINE TAXES	$17,322,409	$17,411,049	$21,939,061	26.0%	26.7%
FOREST PRODUCTS HARVEST TAXES	$12,900,547	$14,536,165	$14,175,450	-2.5%	9.9%
ELECTRIC COOP TAX	$7,384,512	$10,174,994	$9,993,691	-1.8%	35.3%
PHONE ACCESS SURCHARGE (RSPF)	$6,381,168	$6,940,010	$7,249,651	4.5%	13.6%
AMUSEMENT DEVICE TAX	$1,917,049	$2,106,564	$3,154,190	49.7%	64.5%
HAZARDOUS SUBSTANCE TAXES	$2,481,753	$3,325,260	$2,924,391	-12.1%	17.8%
AVIATION GAS AND JET FUEL TAXES	$1,833,169	$4,303,589	$5,762,706	33.9%	214.4%
PETROLEUM LOADING FEE	$1,162,694	$2,738,925	$2,999,736	9.5%	158.0%
BOXING TAX	$44,603	$0	$25,295	NA	-43.3%
PRIVATE RAIL CAR TAX	$216,287	$240,149	$215,663	-10.2%	-0.3%
OIL & GAS SEVERANCE TAX	$142,129	$1,225	$510	-58.4%	-99.6%
STATE LODGING TAX	$11,938,346	$23,824,563	$36,632,752	53.8%	206.8%
COURT FEES, FINES & ASSESSMENTS		$45,433,443	$45,679,944	0.5%	NA
CORPORATE ACTIVITY TAX	NA	$1,148,386,670	$1,209,610,736	5.3%	NA
MEDICAL PROVIDER/HOSPITAL TAXES	$428,304,063	$1,024,702,185	$1,097,445,462	7.1%	156.2%
MARIJUANA TAX	NA	$178,262,488	$170,572,100	-4.3%	NA
HEAVY EQUIPMENT RENTAL TAX	NA	$7,347,348	$11,248,885	53.1%	NA
STATEWIDE TRANIST PAYROLL TAX	NA	$110,678,300	$118,553,909	7.1%	NA
BICYCLE EXCISE TAX	NA	$1,025,648	$821,420	-19.9%	NA
VEHICLE DEALER PRIVILEGE TAX	NA	$29,680,240	$32,493,528	9.5%	NA
VEHICLE USE TAX	NA	$7,932,371	$8,913,127	12.4%	NA
OTHER DOR COLLECTIONS	NA	$57,069,830	$49,866,659	-12.6%	NA
LOCAL TAXES	**2011-2012**	**2020-2021**	**2021-22**	**% change**	**since 2011**
PROPERTY TAXES*	$2,800,781,460	$7,855,999,385	$8,265,117,398	5.2%	195.1%
TRANSIT PAYROLL & EMPLOYMENT TAXES	$163,488,288	$454,721,130	$496,225,754	9.1%	203.5%
FRANCHISE TAXES***	$115,617,000	$314,876,411	$338,237,172	7.4%	192.5%
HOTEL-MOTEL	$64,150,000	$163,823,199	$284,659,906	73.8%	343.7%
PORTLAND BUSINESS LICENSE TAX**	$50,794,774	$178,536,199	$205,838,568	15.3%	305.2%
MULTNOMAH COUNTY BUSINESS TAX	$52,250,000	$136,242,000	$169,300,000	24.3%	224.0%
MOTOR VEHICLE RENTAL TAX	$21,852,000	$20,324,000	$38,173,000	87.8%	74.7%
MOTOR FUEL TAXES	$9,837,758	$32,610,022	$34,904,095	7.0%	254.8%
WASHINGTON COUNTY TRANSFER TAX	$2,840,473	$7,987,787	$9,734,246	21.9%	242.7%
LOCAL MARIJUANA TAX	NA	$28,001,433	$26,876,865	-4.0%	NA
OTHER TAXES ***	$237,878,000	$964,045,620	$1,150,810,365	19.4%	383.8%

* includes tax imposed and urban renewal revenue

** For tax year 2018 and beyond the City of Portland raised its tax rate from $2.2% to 2.6%.

*** Estimates where actuals are not available

Source: 2024 Oregon Public Finance Basic Facts Research Report #1-24 Legislative Revenue Office. (04/08/2024) In Oregonlegislature.gov Retrieved 21 May 2024, https://www.oregonlegislature.gov/lro/Documents/Final%20Basic%20Facts%202024.pdf, Page A7.

TABLE 7

SUMMARY OF OREGON TAXES

STATE	*FY 2013*	*FY 2022*	*FY 2023*	*y/y % change*	*% change since 2013*
PERSONAL INCOME TAX	$6,258,703,426	$12,354,562,424	$13,283,804,318	7.5%	112.2%
UNEMPLOYMENT INSURANCE TAXES	$1,041,205,209	$1,168,338,432	$1,110,245,034	-5.0%	6.6%
GASOLINE AND USE FUEL TAXES	$486,134,061	$654,945,569	$669,523,637	2.2%	37.7%
CORPORATE INCOME TAX	$452,888,190	$1,621,859,675	$1,743,391,356	7.5%	284.9%
WEIGHT MILE TAX	$266,618,694	$458,268,167	$459,444,318	0.3%	72.3%
CIGARETTE TAX	$198,548,451	$372,893,164	$325,087,407	-12.8%	63.7%
INSURANCE TAXES	$53,066,995	$36,676,167	$40,558,191	10.6%	-23.6%
OTHER LABOR TAXES	$72,102,306	$68,653,030	$70,512,566	2.7%	-2.2%
TIMBER SEVERANCE TAXES	$531,848	$470,275	$579,190	23.2%	8.9%
ESTATE (INHERITANCE) TAX	$101,862,939	$325,074,569	$325,470,240	0.1%	219.5%
WORKERS' COMP INSURANCE TAXES	$49,712,523	$87,345,441	$95,608,731	9.5%	92.3%
PHONE EXCHANGE (911) ACCESS TAX	$39,175,232	$78,159,964	$79,425,729	1.6%	102.7%
OTHER TOBACCO PRODUCTS TAX	$56,690,359	$94,003,240	$88,536,656	-5.8%	56.2%
REAL ESTATE RECORDING	$35,696,662	$72,522,270	$46,099,976	-36.4%	29.1%
SENIOR DEFERRED PROPERTY TAX		$11,952,772	$11,647,854	-2.6%	NA
BEER & WINE TAXES	$16,419,394	$21,939,061	$17,286,957	-21.2%	5.3%
FOREST PRODUCTS HARVEST TAXES	$14,148,783	$14,175,450	$20,827,830	46.9%	47.2%
ELECTRIC COOP TAX	$8,569,627	$9,993,691	$10,919,766	9.3%	27.4%
PHONE ACCESS SURCHARGE (RSPF)	$6,350,022	$7,249,651	$2,240,175	-69.1%	-64.7%
AMUSEMENT DEVICE TAX	$1,924,133	$3,154,190	$2,736,173	-13.3%	42.2%
HAZARDOUS SUBSTANCE TAXES	$2,510,906	$2,924,391	$3,156,764	7.9%	25.7%
AVIATION GAS AND JET FUEL TAXES	$1,997,135	$5,762,706	$6,125,537	6.3%	206.7%
PETROLEUM LOADING FEE	$1,133,013	$2,999,736	$2,935,240	-2.2%	159.1%
BOXING TAX	$44,603	$25,295	$131,467	419.7%	194.7%
PRIVATE RAIL CAR TAX	$258,058	$215,663	$267,584	24.1%	3.7%
OIL & GAS SEVERANCE TAX	$64,227	$510	$0	-100.0%	-100.0%
STATE LODGING TAX	$12,793,208	$36,632,752	$40,968,257	11.8%	220.2%
COURT FEES, FINES & ASSESSMENTS		$45,679,944	$48,678,665	6.6%	NA
CORPORATE ACTIVITY TAX	NA	$1,209,610,736	$1,224,933,499	1.3%	NA
MEDICAL PROVIDER/HOSPITAL TAXES	$428,998,782	$1,097,445,462	$1,181,190,862	7.6%	175.3%
MARIJUANA TAX	NA	$170,572,100	$142,133,231	-16.7%	NA
HEAVY EQUIPMENT RENTAL TAX	NA	$11,248,885	$7,325,306	-34.9%	NA
STATEWIDE TRANSIT PAYROLL TAX	NA	$118,553,909	$127,931,876	7.9%	NA
BICYCLE EXCISE TAX	NA	$821,420	$1,113,281	35.5%	NA
VEHICLE DEALER PRIVILEGE TAX	NA	$32,493,528	$33,742,280	3.8%	NA
VEHICLE USE TAX	NA	$8,913,127	$9,071,775	1.8%	NA
OTHER DOR COLLECTIONS	NA	$49,866,659	$48,048,512	-3.6%	NA
LOCAL TAXES	***2012-13***	***2021-22***	***2022-23***	***% change***	***since 2013***
PROPERTY TAXES*	$5,174,628,651	$8,265,117,398	$8,698,220,003	5.2%	68.1%
TRANSIT PAYROLL & EMPLOYMENT TAXES	$278,925,838	$496,225,754	$526,127,246	6.0%	88.6%
FRANCHISE TAXES***	$228,016,590	$338,237,172	$368,911,631	9.1%	61.8%
HOTEL-MOTEL	$107,000,000	$284,659,906	$375,281,536	31.8%	250.7%
PORTLAND BUSINESS LICENSE TAX**	$78,214,550	$205,838,568	$206,090,000	0.1%	163.5%
MULTNOMAH COUNTY BUSINESS TAX	$58,750,000	$169,300,000	$162,200,000	-4.2%	176.1%
MOTOR VEHICLE RENTAL TAX	$24,764,000	$38,173,000	$41,019,000	7.5%	65.6%
MOTOR FUEL TAXES	$15,602,172	$34,904,095	$33,932,232	-2.8%	117.5%
WASHINGTON COUNTY TRANSFER TAX	$3,409,272	$9,734,246	$6,827,410	-29.9%	100.3%
LOCAL MARIJUANA TAX	NA	$26,876,865	$22,389,558	-16.7%	NA
OTHER TAXES ***	$542,140,730	$1,150,810,365	$1,235,722,156	7.4%	127.9%

* includes tax imposed and urban renewal revenue

** For tax year 2018 and beyond the City of Portland raised its tax rate from $2.2% to 2.6%.

*** Estimates where actuals are not available

LRO: 4/8/2024 A7 Report #1-24

REVENUE IMPACT OF PROPOSED LEGISLATION

82nd Oregon Legislative Assembly
2023 Regular Session
Legislative Revenue Office

Bill Number:	**SB 498 - 4**
Revenue Area:	**Estate Tax**
Economist:	**Jonathan Hart**
Date:	**5/31/2023**

Only Impacts on Original or Engrossed Versions are Considered Official

Measure Description:

Creates an exclusion from the Estate Tax for any interest in natural resource property that is held by a decedent for at least five years prior to death and is transferred, at the time of death to one or more family members of the decedent. Requires material participation of a family member 75% of each year five years prior to decedent's death and five years after. Reimposes tax eliminated by the exclusion if the property is sold or transferred to a person other than a family member in the five calendar years after the decedent's death or if material participation requirement is not met. Allows estates to claim an exclusion of up to $15 million of natural resource property value and prohibits claiming the existing Natural Resource Credit if they claim such exclusion. Applies to the estates of decedents dying on or after July 1, 2023.

Revenue Impact (in $Millions):

	Fiscal Year		Biennium		
	2023-24	2024-25	2023-25	2025-27	2027-29
General Fund - Estate Tax	- $0.6	- $7.4	- $8.0	- $15.5	- $16.4

Impact Explanation:

The measure creates an option for estates with natural resource property to claim either the existing Natural Resource Credit, or the new exclusion. The exclusion is more favorable due to reduced requirements for ownership and business-use of qualifying property, an increased maximum value of qualifying property, and an elimination of the maximum total value of property in estates that qualify. The revenue impact includes the reduction in tax that is expected for estates that use the exclusion and would have claimed the credit, as well as estates that use the exclusion but would not have claimed the credit.

Currently about 50 to 60 estates use the credit each year. The average tax reduction to those that qualify for the credit will increase with the exclusion both because the exclusion provides a greater benefit for a given value of property, and because the ownership and business-use requirements for claimed property will increase the value of property those estates claim. Based on estate tax returns, it is estimated the total reduction in tax for estates in 2024 that would otherwise claim the credit would be $1.6 million with the exclusion in addition to the reduction they would get if only the credit were available.

Based on property value statistics as well as income and wealth statistics for farm, forest, and fishing property owners, it is estimated that each year about 170 Oregon estates that owe estate tax have some natural resource property but are not currently using the credit because of current value limitations or ownership and business-

State Capitol Building
900 Court St NE
Salem, Oregon 97301-1347

Phone (503) 986-1266
Fax (503) 986-1770
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use requirements. Such estates are estimated to have reduced tax under the new exclusion of about $5.9 million for 2024. The revenue estimate for estates that don't currently use the credit are adjusted based on statistics for length of ownership for family farms and the amount of farmland owned by non-farmer landlords.

The due date for estate tax payments is 12 months after death of the decedent. Growth in the revenue impact each year is based on growth in the number of estates, and in the value of natural resource property. The growth estimates primarily rely on forecasts developed the Office of Economic Analysis including deaths in the Oregon population forecast as well as the estate tax collections forecast.

Creates, Extends, or Expands Tax Expenditure: Yes ☒ No ☐

The policy purpose of this measure is to alleviate the need for estates with natural resource property to sell assets to pay estate tax, facilitating the passage of property ownership to family members.

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Fax (503) 986-1770
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Farmer Terry Asset List
DOD 11/01/2023

Assume widowed without any planning so Farmer Terry owns all of the assets. knowledge. Farmer Terry has three children – Andy, Blake, and Casey. Blake has their own farm and helps Farmer Terry.

Operating Entity, Inc.		
Equipment	$1,000,000	
Crops unsold	$300,000	
Bank account	$100,000	
Chemicals	$100,000	
LOC	($300,000)	
Total		**$1,200,000**
Land and improvements		**$2,800,000**
Equipment not in Inc.		**$240,000**
Bank accounts	$100,000	
Tangible Personal Property	$10,000	
IRA	$100,000	
Life Insurance	$100,000	
Total		$310,000
Appraisals	($20,000)	
CPA/Attorney	($30,000)	
Total		($50,000)
Taxable Estate		$4,500,000
Potential NRP		**$4,240,000**

Oregon Estate Tax		Expenses	Liquidity Need
with no elections	$367,500	50,000	$417,500
with NRC	$21,333	50,000	$71,333
with NRE/Triple F	$0	50,000	$50,000

Using the Natural Resource Credit

2023 Form OR-706

Page 1 of 3, 150-104-001 (Rev. 07-11-23, ver. 01)

Oregon Department of Revenue

17512301010000

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Oregon Estate Transfer Tax Return

Submit original form—do not submit photocopy.

Part 1 (Print or type)

☐ ● **Amended Return**

● **Decedent** first name	● Initial	● **Decedent** last name	● **Decedent** Social Security number (DSSN)
Terry		Farmer **, Estate**	– –

Decedent domicile (legal residence)

● City	● County	● State	● Country

● Date of birth	● Date of death	● Year domicile established
/ /	11 / 01 / 2023	

Is the estate being probated in Oregon?

● If Yes— Oregon county:

● Oregon probate number:

☐ ● An extension of time to **file** was previously requested

☐ ● An extension of time to **pay** was previously requested

☐ ● A separate election is claimed

● **Executor** name	● **Executor** SSN	● **Executor** FEIN
	– –	–

● **Executor** mailing address	● City	● State	● ZIP code

● **Executor** title	● **Executor** phone
	( ) –

Include a copy of all required schedules and supporting documents.

Part 2—Tax computation

1. Total gross estate (from page 3, part 5, line 512)	● 1.	4,550,000.00
2. Total allowable deductions (from page 3, part 5, line 522)	● 2.	50,000.00
3. Natural resource property exemption (see instructions)	● 3.	.00
4. Taxable estate (line 1 minus lines 2 and 3, if applicable)	● 4.	4,500,000.00
5. Oregon estate tax (see instructions, part 6, for tax table)	● 5.	367,500.00
6. Gross value of property located in Oregon (see instructions)	● 6.	4,550,000.00
7. Oregon percentage (line 6 divided by line 1, round to four decimal places, no more than 100%)	● 7.	100.0000 %
8. Tax payable to Oregon (line 5 multiplied by line 7)	● 8.	367,500.00
9. Natural Resource Credit (from Schedule OR-NRC, line 12)	● 9.	346,267.00
10. Forest Conservation Tax Credit (see instructions)	● 10.	0.00
11. Net estate tax (line 8 minus lines 9 and 10)	● 11.	21,233.00
12. Amount paid by original due date of return (see instructions)	● 12.	21,233.00
13. Tax due. Is line 11 more than line 12? If so, line 11 minus line 12	● 13.	21,233.00
14. **Overpayment.** Is line 12 more than line 11? If so, line 12 minus line 11	● 14.	0.00
15. Penalty for late filing or late payment (see instructions)	● 15.	0.00
16. Interest on late payment (see instructions)	● 16.	0.00
17. **Total due** (add lines 13, 15, and 16)	● 17.	21,233.00
18. **Refund** (line 14 minus lines 15 and 16)	● 18.	0.00

Signature and authorization: Under penalties of false swearing, I declare that I have examined this return, including accompanying schedules and statements. To the best of my knowledge and belief it is true, correct, and complete. If prepared by a person other than the executor, this declaration is based on all information of which the preparer has any knowledge.

Executor signature	Date	Executor phone
X	/ /	( ) –
Title	**Executor SSN**	**Executor FEIN**
	– –	–

☐ ● **Check the box to authorize** the following individual(s) to receive and provide confidential tax information relating to this return.

● Preparer first name (print)	● Initial	● Preparer last name	Title

● Preparer mailing address	● City	● State	● ZIP code

Preparer signature	Phone	Date	● Preparer license
X	( ) –	/ /	

2023 Schedule OR-NRC

Page 1 of 3, 150-104-003 Oregon Department of Revenue

17522301010000

(Rev. 06-01-23, ver. 01)

Oregon Natural Resource Credit

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Submit original form—do not submit photocopy.

● **Decedent** first name	● Initial	● **Decedent** last name	**Decedent** Social Security number (SSN): ●
Terry		Farmer **, Estate**	— —

Part 1. Qualifying natural resource or commercial fishing business property, is 50 percent or more of the adjusted gross estate, which doesn't exceed $15 million (ORS 118.140). To determine your adjusted gross estate, go to part 5 of this schedule. Real property must be in Oregon per ORS 118.140(1)(L). Check all boxes below which apply to this estate:

- ● [X] Farm use defined in ORS 308A.056
- ● [X] Farm use defined in ORS 308A.250
- ● [ ] Forestland defined in ORS 321.201
- ● [ ] Forestland defined in ORS 308A.250
- ● [ ] Property used in commercial fishing business, as defined by IRC 1301(b)(4), and licensed under ORS 508
- ● [ ] Property of a commercial fishing business licensed under ORS chapter 508, that is used to process and sell the catch to consumers, including a restaurant with seating capacity of less than 15

The credit isn't valid unless parts 1–5 are completed:

a. Part 4 must be signed by each qualified heir with an interest in the natural resource or commercial fishing business property; and

b. The completed Schedule OR-NRC is filed with Form OR-706, *Oregon Estate Transfer Tax Return*, 150-104-001.

Part 2. Description of property. List all natural resource and commercial fishing business property owned by the estate, even if you're not claiming the natural resource credit for all natural resource properties. All properties listed below must also be listed on the applicable schedules filed with Form OR-706. Complete all columns.

- If you claim an operating allowance, it may not exceed the lesser of $1 million or 15 percent of the total value of natural resource property claimed for this credit, not including the operating allowance.
- Include a legal description of all property described in column B.
- Include copies of fee appraisals used to determine date of death property values listed in column C and any other documents used to establish date of death value.

● **A. Schedule and item no. from Form OR-706**	● **B. Description of the qualifying property and date when property was acquired**	● **C. Fair market value as reported on Form OR-706 schedules**	● **D. Value of qualifying property on which the credit is calculated**
Sch. A item 1	Operating Entity Inc.	1,200,000.00	1,200,000.00
Sch. A item 2	Land and improvements (legal attached)	2,800,000.00	2,800,000.00
Sch. A item 3	Equipment	240,000.00	240,000.00
		.00	.00
	Column totals ●	4,240,000.00 ●	4,240,000.00

Part 3. Qualified heir(s). Identify each qualified heir receiving an interest in property upon which the credit is calculated. "Qualified heir" is a member of a decedent's family as defined in Section 2032A and/or the decedent's registered domestic partner, defined in chapter 106. Include additional pages if more lines are needed. The executor/administrator of this estate will provide a complete copy of this Schedule OR-NRC to each of the qualified heir(s) identified below.

● 1. First name	● Initial	● Last name	● SSN	● FEIN
Andy		Farmer	— —	—

● Entity

● Address	● City	● State	● ZIP code

● Relationship to decedent	**FMV or heir's portion of qualified property** ●
child	1,413,333.00

● 2. First name	● Initial	● Last name	● SSN	● FEIN
Blake		Farmer	— —	—

● Entity

● Address	● City	● State	● ZIP code

● Relationship to decedent	**FMV or heir's portion of qualified property** ●
child	1,413,333.00

2023 Schedule OR-NRC

Page 1 of 3, 150-104-003 Oregon Department of Revenue

17522301010000

(Rev. 06-01-23, ver. 01)

Oregon Natural Resource Credit

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Submit original form—do not submit photocopy.

● **Decedent** first name	● Initial	● **Decedent** last name	**Decedent** Social Security number (SSN): ●
		, Estate	– –

Part 1. Qualifying natural resource or commercial fishing business property, is 50 percent or more of the adjusted gross estate, which doesn't exceed $15 million (ORS 118.140). To determine your adjusted gross estate, go to part 5 of this schedule. Real property must be in Oregon per ORS 118.140(1)(L). Check all boxes below which apply to this estate:

- ● ☐ Farm use defined in ORS 308A.056
- ● ☐ Farm use defined in ORS 308A.250
- ● ☐ Forestland defined in ORS 321.201
- ● ☐ Forestland defined in ORS 308A.250
- ● ☐ Property used in commercial fishing business, as defined by IRC 1301(b)(4), and licensed under ORS 508
- ● ☐ Property of a commercial fishing business licensed under ORS chapter 508, that is used to process and sell the catch to consumers, including a restaurant with seating capacity of less than 15

The credit isn't valid unless parts 1–5 are completed:

a. Part 4 must be signed by each qualified heir with an interest in the natural resource or commercial fishing business property; and

b. The completed Schedule OR-NRC is filed with Form OR-706, *Oregon Estate Transfer Tax Return*, 150-104-001.

Part 2. Description of property. List all natural resource and commercial fishing business property owned by the estate, even if you're not claiming the natural resource credit for all natural resource properties. All properties listed below must also be listed on the applicable schedules filed with Form OR-706. Complete all columns.

- If you claim an operating allowance, it may not exceed the lesser of $1 million or 15 percent of the total value of natural resource property claimed for this credit, not including the operating allowance.
- Include a legal description of all property described in column B.
- Include copies of fee appraisals used to determine date of death property values listed in column C and any other documents used to establish date of death value.

● **A. Schedule and item no. from Form OR-706**	● **B. Description of the qualifying property and date when property was acquired**	● **C. Fair market value as reported on Form OR-706 schedules**	● **D. Value of qualifying property on which the credit is calculated**
		.00	.00
		.00	.00
		.00	.00
		.00	.00
	Column totals ●	.00	● .00

Part 3. Qualified heir(s). Identify each qualified heir receiving an interest in property upon which the credit is calculated. "Qualified heir" is a member of a decedent's family as defined in Section 2032A and/or the decedent's registered domestic partner, defined in chapter 106. Include additional pages if more lines are needed. The executor/administrator of this estate will provide a complete copy of this Schedule OR-NRC to each of the qualified heir(s) identified below.

● 1. First name	● Initial	● Last name	● SSN	● FEIN
Casey		Farmer	– –	–

● Entity

● Address	● City	● State	● ZIP code

● Relationship to decedent	**FMV or heir's portion of qualified property** ●
Child	1,413,333.00

● 2. First name	● Initial	● Last name	● SSN	● FEIN
			– –	–

● Entity

● Address	● City	● State	● ZIP code

● Relationship to decedent	**FMV or heir's portion of qualified property** ●
	.00

2023 Schedule OR-NRC

17522301020000

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●**Decedent** first name	● Initial	● **Decedent** last name		
Terry		Farmer	**, Estate**	**Decedent** SSN: – –

Part 4. Valid election. Natural resource or commercial fishing business property credit.
We (list the qualified heirs having an interest in the natural resource or commercial fishing business property)

Andy Farmer, Blake Farmer and Casey Farmer

are the qualified heirs having interest in the natural resource or commercial fishing business property. We approve of the election made by

Andy Farmer

executor/administrator of the estate of Terry Farmer

We, the qualified heirs, understand ORS 118.140 requires the following conditions be met:

1. The qualified heir must use the property as a natural resource property or commercial fishing business property for which a credit is elected for at least five out of eight calendar years following the decedent's death to qualify for the credit.
2. The heir who inherits the natural resource property will file the Form OR-NRC-CERT, *Annual Certification for Oregon Natural Resource Credit*, with the department each year, due on April 15th. With the annual certification form the heir certifies continued qualified use of the property according to ORS 118.140.
3. During the five out of eight calendar years required use period, described in number 1 above, the qualified heir may transfer the natural resource or commercial fishing business property to another qualified heir who is eligible for the credit. Upon transfer of property to a qualified heir, file Form OR-706-R; transfer to a qualified heir generally results in no additional tax, however the OR-706-R is required to be filed for reporting purposes.
4. If the heir doesn't use the property as a natural resource or commercial fishing business property for five out of eight calendar years following the decedent's death, or the heir disposes of the property, an additional tax under ORS 118.005 to 118.540 may be due from the heir.
   a. The additional tax liability will be the amount of additional tax that would have been imposed had the disqualified property value not been included in the natural resource credit calculation multiplied by [(five minus the number of years the property was used as natural resource property) divided by five].
   b. Form OR-706-R, will be required from the heir and the additional estate transfer tax paid within six months after the disqualifying event occurs.

The signature of each qualified heir, or each trustee of a trust, is required for a valid election:

(Signature of qualified heir) Date (MM/DD/YYYY)

(Signature of qualified heir) Date (MM/DD/YYYY)

(Signature of qualified heir) Date (MM/DD/YYYY)

(Signature of qualified heir) Date (MM/DD/YYYY)

(Signature of qualified heir) Date (MM/DD/YYYY)

(Signature of qualified heir) Date (MM/DD/YYYY)

(Signature of qualified heir) Date (MM/DD/YYYY)

Include additional pages if more signature lines are needed. If all of the qualified heirs can't sign the same page, it is acceptable to have a separate signature page for each heir.

2023 Schedule OR-NRC

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17522301030000

● **Decedent** first name	● Initial	● **Decedent** last name		**Decedent** SSN:
Terry		Farmer	**, Estate**	– –

Part 5. Worksheet for your natural resource credit Schedule OR-NRC.

1. Total gross estate (Form OR-706, part 2, line 1)	1.	4,550,000.00	
2. Less:			
a. Schedules J and K (Form OR-706, part 5, line 516)	2a.	50,000.00	
b. Schedule L (Form OR-706, part 5, lines 518 and 519)	2b.	0.00	
3. Total adjusted gross estate (subtract 2a and 2b from line 1)	3.		4,500,000.00
Stop if this amount is more than $15 million; you don't qualify for the credit.			
4. Oregon gross estate (Form OR-706, part 2, line 6)	4.	4,550,000.00	
5. Less:			
a. Schedules J and K, as deductions relate to Oregon gross estate, (Form OR-706, part 5, line 516)	5a.	50,000.00	
b. Schedule L, as deductions relate to Oregon gross estate, (Form OR-706, part 5, lines 518 and 519)	5b.	0.00	
6. Oregon adjusted gross estate (subtract 5a and 5b from line 4)	6.		4,500,000.00
7. Value of all eligible natural resource or fishing property. (Schedule OR-NRC, part 2, column C total)	7.		4,240,000.00
8. Oregon natural resource property percentage (divide line 7 by line 6 and multiply by 100; round to four decimal places)	8.		94.2222%
Stop if this percentage is less than 50 percent; you don't qualify for the credit.			
9. Value of Oregon natural resource property on which the credit is calculated (Schedule OR-NRC, part 2, column D total; **don't enter more than $7.5 million**)	9.		4,240,000.00
10. Divide line 9 by line 3 (round to four decimal places)	10.		0.9422
11. Estate tax payable to Oregon (Form OR-706, part 2, line 8)	11.		367,500.00
12. Oregon natural resource credit (multiply line 11 by 10). Enter on Form OR-706, part 2, line 9	12.		346,267.00

Example

The estate has a total gross estate of $4,225,000; assets in Oregon are valued at $1,450,000. The remaining assets and real property are outside of Oregon. The Oregon Natural Resource property has a gross value of $900,000. Schedule J and K expenses are $135,000, of which $46,000 relates to the Oregon portion of the estate. Schedule L expenses of $90,000 relate to a mortgage on out of state property. The Oregon estate tax, Form OR-706, part 2, line 8, is $99,558.

1. Total gross estate (Form OR-706, part 2, line 1)	1.	$ 4,225,000	
2. Less:			
a. Schedules J and K (Form OR-706, part 5, line 516)	2a.	135,000	
b. Schedule L (Form OR-706, part 5, lines 518 and 519)	2b.	90,000	
3. Total adjusted gross estate (subtract 2a and 2b from line 1)	3.		4,000,000
Stop if this amount is more than $15 million; you do not qualify for the credit.			
4. Oregon gross estate (Form OR-706, part 2, line 6)	4.	1,450,000	
5. Less:			
a. Schedules J and K, as deductions relate to Oregon gross estate, (Form OR-706, part 5, line 516)	5a.	46,000	
b. Schedule L, as deductions relate to Oregon gross estate, (Form OR-706, part 5, lines 518 and 519)	5b.	0	
6. Oregon adjusted gross estate (subtract 5a and 5b from line 4)	6.		1,404,000
7. Value of all eligible natural resource or fishing property. (Schedule OR-NRC, part 2, column C total)	7.		900,000
8. Oregon natural resource property percentage (divide line 7 by line 6 and multiply by 100; round to four decimal places)	8.		64.1000%
Stop if this percentage is less than 50 percent; you don't qualify for the credit.			
9. Value of Oregon natural resource property on which the credit is calculated (Schedule OR-NRC, part 2, column D total; **don't enter more than $7.5 million**)	9.		900,000
10. Divide line 9 by line 3 (round to four decimal places)	10.		0.2250
11. Estate tax payable to Oregon (Form OR-706, part 2, line 8)	11.		99,558
12. Oregon natural resource credit (multiply line 11 by 10). Enter on Form OR-706, part 2, line 9	12.		22,401

Include pages 1, 2 and 3 of this schedule with Form OR-706 and provide a complete copy of Schedule OR-NRC to each qualified heir identified in part 3.

If Operating Entity, Inc. is not eligible for the exemption

2023 Form OR-706

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Oregon Department of Revenue

17512301010000

Office use only

Oregon Estate Transfer Tax Return

Submit original form—do not submit photocopy.

Part 1 (Print or type)

☐ ● **Amended Return**

● **Decedent** first name	● Initial	● **Decedent** last name	● **Decedent** Social Security number (DSSN)
Terry		Farmer **, Estate**	– –

Decedent domicile (legal residence)

● City	● County	● State	● Country

● Date of birth	● Date of death	● Year domicile established
/ /	11 / 01 / 2023	

Is the estate being probated in Oregon?

● If Yes— Oregon county:

● Oregon probate number:

☐ ● An extension of time to **file** was previously requested

☐ ● An extension of time to **pay** was previously requested

☐ ● A separate election is claimed

● **Executor** name	● **Executor** SSN	● **Executor** FEIN
	– –	–

● **Executor** mailing address	● City	● State	● ZIP code

● **Executor** title	● **Executor** phone
	( ) –

Include a copy of all required schedules and supporting documents.

Part 2—Tax computation

1. Total gross estate (from page 3, part 5, line 512)	1.	4,550,000.00
2. Total allowable deductions (from page 3, part 5, line 522)	2.	50,000.00
3. Natural resource property exemption (see instructions)	3.	3,040,000.00
4. Taxable estate (line 1 minus lines 2 and 3, if applicable)	4.	1,460,000.00
5. Oregon estate tax (see instructions, part 6, for tax table)	5.	46,000.00
6. Gross value of property located in Oregon (see instructions)	6.	4,550,000.00
7. Oregon percentage (line 6 divided by line 1, round to four decimal places, no more than 100%)	7.	100.0000 %
8. Tax payable to Oregon (line 5 multiplied by line 7)	8.	46,000.00
9. Natural Resource Credit (from Schedule OR-NRC, line 12)	9.	0.00
10. Forest Conservation Tax Credit (see instructions)	10.	0.00
11. Net estate tax (line 8 minus lines 9 and 10)	11.	46,000.00
12. Amount paid by original due date of return (see instructions)	12.	46,000.00
13. Tax due. Is line 11 more than line 12? If so, line 11 minus line 12	13.	46,000.00
14. **Overpayment.** Is line 12 more than line 11? If so, line 12 minus line 11	14.	0.00
15. Penalty for late filing or late payment (see instructions)	15.	0.00
16. Interest on late payment (see instructions)	16.	0.00
17. **Total due** (add lines 13, 15, and 16)	17.	0.00
18. **Refund** (line 14 minus lines 15 and 16)	18.	0.00

Signature and authorization: Under penalties of false swearing, I declare that I have examined this return, including accompanying schedules and statements. To the best of my knowledge and belief it is true, correct, and complete. If prepared by a person other than the executor, this declaration is based on all information of which the preparer has any knowledge.

Executor signature	Date	Executor phone
X	/ /	( ) –
Title	**Executor SSN**	**Executor FEIN**
	– –	–

● **Check the box to authorize** the following individual(s) to receive and provide confidential tax information relating to this return.

☐

● Preparer first name (print)	● Initial	● Preparer last name	Title

● Preparer mailing address	● City	● State	● ZIP code

Preparer signature	Phone	Date	● Preparer license
X	( ) –	/ /	

If Operating Entity, Inc. is eligible for exemption

2023 Form OR-706

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Oregon Department of Revenue

17512301010000

Office use only

Oregon Estate Transfer Tax Return

Submit original form—do not submit photocopy.

Part 1 (Print or type)

☐ ● **Amended Return**

● **Decedent** first name	● Initial	● **Decedent** last name	● **Decedent** Social Security number (DSSN)
Terry		Farmer **, Estate**	– –

Decedent domicile (legal residence)

● City	● County	● State	● Country

● Date of birth	● Date of death	● Year domicile established
/ /	11 / 01 / 2023	

Is the estate being probated in Oregon?

● If Yes— Oregon county:

● Oregon probate number:

☐ ● An extension of time to **file** was previously requested

☐ ● An extension of time to **pay** was previously requested

☐ ● A separate election is claimed

● **Executor** name	● **Executor** SSN	● **Executor** FEIN
	– –	–

● **Executor** mailing address	● City	● State	● ZIP code

● **Executor** title	● **Executor** phone
	( ) –

Include a copy of all required schedules and supporting documents.

Part 2—Tax computation

1. Total gross estate (from page 3, part 5, line 512)	1.	4,550,000.00
2. Total allowable deductions (from page 3, part 5, line 522)	2.	50,000.00
3. Natural resource property exemption (see instructions)	3.	4,240,000.00
4. Taxable estate (line 1 minus lines 2 and 3, if applicable)	4.	260,000.00
5. Oregon estate tax (see instructions, part 6, for tax table)	5.	0.00
6. Gross value of property located in Oregon (see instructions)	6.	4,550,000.00
7. Oregon percentage (line 6 divided by line 1, round to four decimal places, no more than 100%)	7.	100.0000 %
8. Tax payable to Oregon (line 5 multiplied by line 7)	8.	0.00
9. Natural Resource Credit (from Schedule OR-NRC, line 12)	9.	0.00
10. Forest Conservation Tax Credit (see instructions)	10.	0.00
11. Net estate tax (line 8 minus lines 9 and 10)	11.	0.00
12. Amount paid by original due date of return (see instructions)	12.	0.00
13. Tax due. Is line 11 more than line 12? If so, line 11 minus line 12	13.	0.00
14. **Overpayment.** Is line 12 more than line 11? If so, line 12 minus line 11	14.	0.00
15. Penalty for late filing or late payment (see instructions)	15.	0.00
16. Interest on late payment (see instructions)	16.	0.00
17. **Total due** (add lines 13, 15, and 16)	17.	0.00
18. **Refund** (line 14 minus lines 15 and 16)	18.	0.00

Signature and authorization: Under penalties of false swearing, I declare that I have examined this return, including accompanying schedules and statements. To the best of my knowledge and belief it is true, correct, and complete. If prepared by a person other than the executor, this declaration is based on all information of which the preparer has any knowledge.

Executor signature	Date	Executor phone
X	/ /	( ) –
Title	**Executor SSN**	**Executor FEIN**
	– –	–

☐ ● **Check the box to authorize** the following individual(s) to receive and provide confidential tax information relating to this return.

● Preparer first name (print)	● Initial	● Preparer last name	Title

● Preparer mailing address	● City	● State	● ZIP code

Preparer signature	Phone	Date	● Preparer license
X	( ) –	/ /	